No. 14-9496

Title:	Elijah Manuel, Petitioner
	v.
	City of Joliet, Illinois, et al.
Docketed:	April 27, 2015
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(14-1581)
Decision Date:	January 28, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Apr 27 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 27, 2015)
May 20 2015	Waiver of right of respondents City of Joliet, Illinois, et al. to respond filed.
Jun 10 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 17 2015	Response Requested. (Due July 17, 2015)
Oct 20 2015	Order extending time to file response to petition to and including November 4, 2015.
Nov 12 2015	Order further extending time to file response to petition to and including December 4, 2015.
Dec 4 2015	Brief of respondents City of Joliet, Illinois, et al. in opposition filed.
Dec 14 2015	Reply of petitioner Elijah Manuel filed.
Dec 23 2015	DISTRIBUTED for Conference of January 8, 2016.
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 15 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 1 2016	Motion to appoint counsel filed by petitioner Elijah Manuel.
Feb 17 2016	Motion DISTRIBUTED for Conference of March 4, 2016.
Feb 26 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 2, 2016.
Feb 26 2016	The time to file respondents' brief on the merits is extended to and including August 3, 2016.
Mar 7 2016	Motion to appoint counsel filed by petitioner GRANTED and Stanley B. Eisenhammer, Esquire, of Arlington Heights, Illinois, is appointed to serve as counsel for the petitioner in this case.
Apr 12 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Apr 15 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party

	received from counsel for the respondents.
May 2 2016	Joint appendix filed.
May 2 2016	Brief of petitioner Elijah Manuel filed.
May 9 2016	Brief amicus curiae of Albert W. Alschuler filed.
May 9 2016	Brief amicus curiae of United States filed.
May 9 2016	Brief amicus curiae of The National Police Accountability Project filed.
May 9 2016	Brief amicus curiae of The Innocence Network filed.
May 9 2016	Brief amicus curiae of National Association for Public Defense filed.
May 9 2016	Brief amici curiae of U.S. Justice Foundation, et al. filed.
May 9 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 13 2016	SET FOR ARGUMENT on Wednesday, October 5, 2016.
Jul 22 2016	Record requested from U.S.C.A. 7th Circuit.
Jul 22 2016	Record from U.S.C.A. 7th Circuit is electronic and located on PACER.
Aug 3 2016	Brief of respondents City of Joliet, Illinois, et al. filed.
Aug 9 2016	CIRCULATED
Aug 10 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 10 2016	Brief amicus curiae of National District Attorney's Association filed. (Distributed)
Aug 10 2016	Brief amici curiae of National Association of Counties, et al. filed. (Distributed)
Aug 10 2016	Brief amicus curiae of DRI-The Voice of the Defense Bar filed. (Distributed)
Aug 10 2016	Brief amici curiae of Illinois, et al. filed. (Distributed)
Aug 10 2016	Brief amicus curiae of Sheldon H. Nahmod filed. (Distributed)
Sep 2 2016	Reply of petitioner Elijah Manuel filed. (Distributed)
Sep 26 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 5 2016	Argued. For petitioner: Stanley B. Eisenhammer, Arlington Heights, Ill. (Appointed by this Court); and Ilana H. Eisenstein, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Michael A. Scodro, Chicago, Ill.
Mar 21 2017	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Thomas, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Thomas, J., joined.

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Party name: United States

ORIGINAL

No. 14-9496

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
APR 27 2015
OFFICE OF THE CLERK

ELIJAH MANUEL, — PETITIONER
(Your Name)

VS.

CITY OF JOLIET, ET AL., — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals for the Seventh Circuit and United States District Court, Northern District of Illinois, Eastern Division.

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Elijah Manuel
(Signature)

RECEIVED
APR 27 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Elijah Manuel, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): State pay	$ 9.98	$	$	$ 14.98
Total monthly income:	$ 9.98	$	$	$ 14.98

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0 $ $ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ 0 $ 0 $ 0

4. How much cash do you and your spouse have? $ 62.91
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Big Muddy River C.C.	prison Account	$ 62.91	$ 0
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value 0

☐ Motor Vehicle #2
Year, make & model N/A
Value 0

☐ Other assets
Description N/A
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ 0	$ 0
	$ 0	$ 0
	$ 0	$ 0

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$ 0
Are real estate taxes included? ☐ Yes ☑ No		
Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: N/A	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): N/A	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: N/A	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): N/A	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

N/A

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Do to the fact I am incarcerated, I am unemployed and have no income but only state pay $9.98-$14.98 per month I have attached my 6 months of trust Fund statement

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 23rd, 2015

Elijah Manuel
(Signature)

CERTIFICATE

(TO BE COMPLETED BY PRISON STAFF FOR PRISONERS ONLY THE FOLLOWING IS A STATEMENT BY THE PRISON AUTHORITIES AND NOT THE PRISONER.)

I hereby certify that the plaintiff or petitioner in this action has the sum of $62.91

in his inmate trust fund account at this Correctional Center where he is confined. I further certify that the plaintiff or petitioner has the following securities to his credit according to the records of this Institution.

Scott S. Cahill
Authorized Official

Accountant Advanced
Official's Title

Big Muddy River C.C.
Institution

02-17-15
Date

NOTE: THIS CERTIFICATE MUST BE ACCOMPANIED BY A COPY OF A SIX MONTH LEDGER OF THE PLAINTIFF'S INMATE TRUST FUND ACCOUNT.

Elijah Manuel
INMATE NAME (Please Print)

Elijah Manuel
INMATE SIGNATURE

R-49737
IDOC REGISTRATION NUMBER

3-A-38
INMATE'S HOUSING UNIT & CELL

2-23-2015
DATE

(Please return to resident/inmate after completing. Thank you.)

Trust Fund

Inmate Transaction Statement

REPORT CRITERIA - Date: 08/18/2014 thru End; Inmate: R49737; Active Status Only ? : No; Print Restrictions ? : Yes; Transaction Type: All Transaction Types; Print Furloughs / Restitutions ? : Yes; Include Inmate Totals ? : Yes; Print Balance Errors Only ? : No

Inmate: R49737 Manuel, Elijah **Housing Unit: BMR-03-A -38**

e	Source	Transaction Type	Batch	Reference #	Description		Amount	Balance
						Beginning Balance:		91.50
19/14	Point of Sale	60 Commissary	2317108	786803	Commissary		-24.14	67.36
02/14	Point of Sale	60 Commissary	245742	788010	Commissary		-20.71	46.65
11/14	Point of Sale	60 Commissary	2547113	789114	Commissary		-14.47	32.18
12/14	Payroll	20 Payroll Adjustment	255175		P/R month of 8 2014		17.22	49.40
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66025, DOC: 523 Fund, 08/18/2014	Inv. Date:	-5.44	43.96
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66175, DOC: 523 Fund, 08/21/2014	Inv. Date:	-.90	43.06
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66536, DOC: 523 Fund, 08/29/2014	Inv. Date:	-.90	42.16
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66741, DOC: 523 Fund, 09/05/2014	Inv. Date:	-.21	41.95
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66765, DOC: 523 Fund, 09/08/2014	Inv. Date:	-.48	41.47
15/14	Disbursements	81 Legal Postage	258375	Chk #100869	66905, DOC: 523 Fund, 09/12/2014	Inv. Date:	-.90	40.57
08/14	Point of Sale	60 Commissary	2797110	791958	Commissary		-30.14	10.43
09/14	Mail Room	15 JPAY	282200	39121388	Manuel, Debra		25.00	35.43
10/14	Payroll	20 Payroll Adjustment	283138		P/R month of 9 2014		17.22	52.65
15/14	Point of Sale	60 Commissary	2887108	792961	Commissary		-7.57	45.08
17/14	Disbursements	81 Legal Postage	290375	Chk #101264	66938, DOC: 523 Fund, 09/15/2014	Inv. Date:	-4.18	40.90
17/14	Disbursements	81 Legal Postage	290375	Chk #101264	67107, DOC: 523 Fund, 09/18/2014	Inv. Date:	-.69	40.21
17/14	Disbursements	81 Legal Postage	290375	Chk #101264	67308, DOC: 523 Fund, 09/24/2014	Inv. Date:	-.48	39.73
17/14	Disbursements	81 Legal Postage	290375	Chk #101264	67734, DOC: 523 Fund, 10/09/2014	Inv. Date:	-1.19	38.54
28/14	Mail Room	15 JPAY	301200	39832321	Manuel, Debra		25.00	63.54
07/14	Payroll	20 Payroll Adjustment	311138		P/R month of 102014		17.22	80.76
10/14	Point of Sale	60 Commissary	314792	795796	Commissary		-22.56	58.20
17/14	Disbursements	90 Medical Co-Pay	321375	Chk #101607	68228, DOC: 523 Fund, 10/24/2014	Inv. Date:	-5.00	53.20
02/14	Mail Room	15 JPAY	336200	40656454	Manuel, Debra		25.00	78.20
02/14	Point of Sale	60 Commissary	3367110	797557	Commissary		-48.71	29.49
04/14	Mail Room	15 JPAY	338200	40737766	McDaniels, Ruby		25.00	54.49
05/14	Payroll	20 Payroll Adjustment	339138		P/R month of 112014		27.13	81.62
12/14	Point of Sale	60 Commissary	3467110	799157	Commissary		-5.73	75.89
15/14	Disbursements	80 Postage	349375	Chk #101957	69629, DOC: 523 Fund, 12/08/2014	Inv. Date:	-2.03	73.86
23/14	Point of Sale	60 Commissary	3577110	800530	Commissary		-10.83	63.03
08/15	Mail Room	15 JPAY	008200	41829757	Manuel, Debra		25.00	88.03
08/15	Point of Sale	60 Commissary	0087110	801584	Commissary		-12.71	75.32
09/15	Payroll	20 Payroll Adjustment	009138		P/R month of 122014		11.53	86.85
16/15	Disbursements	90 Medical Co-Pay	016375	Chk #102381	70774, DOC: 523 Fund, 01/06/2015	Inv. Date:	-5.00	81.85
21/15	Point of Sale	60 Commissary	021742	803194	Commissary		-18.71	63.14
04/15	Mail Room	15 JPAY	035200	42821494	Manuel, Debra		45.00	108.14
09/15	Point of Sale	60 Commissary	040742	804772	Commissary		-52.00	56.14
13/15	Payroll	20 Payroll Adjustment	044138		P/R month of 1 2015		9.98	66.12

Trust Fund

6:14pm
_jtst_bwside_trans_statement_composite

Inmate Transaction Statement

REPORT CRITERIA Date: 08/18/2014 thru End; Inmate: R49737; Active Status Only ? : No; Print Restrictions ? : Yes; Transaction Type: All Transaction Types; Print Furloughs / Restitutions ? Yes; Include Inmate Totals ? : Yes; Print Balance Errors Only ? : No

nmate: R49737 Manuel, Elijah **Housing Unit: BMR-03-A -38**

Total Inmate Funds:	66 12
Less Funds Held For Orders:	00
Less Funds Restricted:	3 21
Funds Available:	62 91
Total Furloughs:	00
Total Voluntary Restitutions:	00

STRICTIONS

olce Date	Invoice Number	Type	Description	Vendor	Amount
28/2015	71511	Disb	Postage	99999 DOC 523 Fund Inmate Reimburseme	$0 21
05/2015	71805	Disb	Postage	99999 DOC 523 Fund Inmate Reimburseme	$1 40
10/2015	71993	Disb	Library/legal copies	2 DOC 523 Fund Library	$0 20
11/2015	72053	Disb	Postage	99999 DOC 523 Fund Inmate Reimburseme	$1 40
				Total Restrictions:	$3.21

14-9496

NO. _____

In The
Supreme Court of the United States

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment. This question was raised, but left unanswered, by this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). Since then, the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have all held that a Fourth Amendment malicious prosecution claim is cognizable through 42 U.S.C. § 1983 ("Section 1983"). Only the Seventh Circuit holds that a Fourth Amendment Section 1983 malicious prosecution claim is not cognizable.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

City of Joliet, Illinois, a municipal corporation

Officer Terrence J. Gruber

Officer Thomas Conroy

Sergeant Scott P Cammack

Officer Aaron Bandy

Officer Jeffrey German

Sergeant John Stefanski

Sergeant Joseph Rosado

Officer Jeffery Kneller

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BRIEF FOR THE PETITIONER IN SUPPORT

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-5a, affirming the district court's dismissal of the petitioner's complaint is unreported, but is available at 590 F App'x 641, 642. The memorandum order of the district court, App., *infra*, 6a-8a, granting the Respondents' motion to dismiss is also unreported, but is available at 2014 WL 551626.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2015. This petition for writ of certiorari is filed on April 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

STATEMENT OF THE CASE

The issue in this case arises out of the Petitioner's arrest without probable cause and his subsequent incarceration after he became subject to legal process as a result of police misconduct. Under the Fourth Amendment, an individual has a right to be free from

unreasonable search and seizure, i.e., except, upon probable cause. U.S. CONST. amend. IV Under current law, a Fourth Amendment false arrest claim begins at the time of an arrest and ends when the plaintiff undergoes legal process, such as an arraignment. *Wallace v. Kato*, 549 U.S. 384, 389 (2007). After a plaintiff undergoes legal process, any damage the plaintiff suffers is actionable as a malicious prosecution claim. *Id.* at 390.

Although this Court has never fully "explored the contours of a Fourth Amendment malicious prosecution suit under § 1983" (*Wallace*, 549 U.S. at 390, n.2 (citing 42 U.S.C. § 1983)), the plurality opinion and some concurring opinions in *Albright v. Oliver* suggested that a malicious prosecution claim such as the Petitioner's in the present case should be judged under the Fourth Amendment. 510 U.S. 266 (1994). This Court, however, did not decide this issue because the petitioner in *Albright* did not raise it.

Since *Albright*, eight circuit courts of appeal have expressly allowed Fourth Amendment malicious prosecution claims, holding that legal process, such as an arraignment, does not end a plaintiff's Fourth Amendment right to be free from unreasonable seizure. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (compiling cases). Two circuits have implicitly recognized a Fourth Amendment malicious prosecution claim and one circuit has not directly addressed the issue. The Seventh Circuit stands alone among circuits in not allowing a federal malicious prosecution claim grounded on the Fourth Amendment. *See Newsome v. McCabe*, 256 F 3d 747, 751. This split means that geography, not the Constitution nor this Court's jurisprudence, determines whether or not an individual has a federal remedy for a basic civil rights violation.

The Seventh Circuit's initial decision on this issue in *Newsome* was not based on an analysis of the extent of the Fourth Amendment protections afforded to an individual who is

subject to the judicial process, but rather on what it considered "the narrowest ground" of the various opinions in *Albright*. Since *Newsome*, the Seventh Circuit has hinted that its decision did not foreclose a Fourth Amendment malicious prosecution claim (*Johnson v. Saville*, 575 F.3d 656, 663-64 (7th Cir. 2009) ("*Newsome* left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors."); avoided the issue (*Julian v. Hanna* 732 F.3d 842, 846 (7th Cir. 2013)); or twisted itself in circles in order to claim it was not an "outlier" (*Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1185 (2015))—until the opinion below, when, despite acknowledging it stands alone among circuits, it stubbornly chose to adhere to its initial decision in *Newsome*:

> Next Manuel argues that we should reconsider our holding in *Newsome* and recognize a federal claim for malicious prosecution under the Fourth Amendment regardless of the available state remedy. By his count, ten other circuits have recognized federal malicious-prosecution claims under the Fourth Amendment—assuming that the plaintiff has been seized in the course of the malicious prosecution.
>
> As we stated in our most recent endorsement of *Newsome's* rationale: "When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention."

Pet. App. A-3.

A. Factual Background

As this case was decided on a motion to dismiss, this Court should accept as true the facts alleged by the Petitioner below (*Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009)) as the courts below have done.

In the dark, early hours of March 18, 2011, Elijah Manuel ("Manuel" or "Petitioner") was riding in the passenger seat of his car in the city of Joliet, Illinois (Court of Appeals ("C.A.") Sep. Jt. App. 58) when the police pulled over his car. The police would later say that Manuel's

brother, who was driving the car, had failed to signal a turn. C.A. Sep. Jt. App. 113. Two police officers, Terrence Gruber and Thomas Conroy, stepped out of their police vehicle and approached Manuel's car. C.A. Sep. Jt. App. Without warning, Gruber opened the passenger door, grabbed Manuel by the arm and pulled him out of the car. C.A. Sep. Jt. App. 23, 24, 58. Gruber forced Manuel to the ground and beat him. C.A. Sep. Jt. App. 24, 25, 29, 58. Gruber handcuffed Manuel and yelled: "You remember me? I got you now you fucking nigger." C.A. Sep. Jt. App. 24, 29, 58-59, 63. At some point, Sergeant John Stefanski, Sergeant Joseph Rosado, Officer Aaron Bandy, and Officer Jeffrey German of the Joliet Police Department also arrived at the scene. C.A. Sep. Jt. App. 25, 60-62. The police searched Manuel's car, ripping the floor mats and slashing the steering wheel in the process. C.A. Sep. Jt. App. 63.

After handcuffing him, Gruber patted Manuel down and found a bottle of vitamins in Manuel's pocket. C.A. Sep. Jt. App. 22, 59. The police officers conducted a field test on the vitamins and lied about its results by stating the pills tested positive for ecstasy. C.A. Sep. Jt. App. 22, 26, 30, 63, 64, 114. They arrested Manuel and brought him to a police station. C.A. Sep. Jt. App. 23, 64. There, the police officers at the scene of the arrest, along with Officer Scott Cammack, an evidence technician, again tested the pills. C.A. Sep. Jt. App. 26, 45, 64, 115. Again, the results showed that the pills were not a controlled substance.

Yet, the police officers maintained their lie. C.A. Sep. Jt. App. 26, 64, 115. In order to bring charges and an indictment against Manuel, the police officers included false statements in their police report, such as: when Gruber approached the car, he observed Manuel moving "quickly towards the center console" (although Gruber was standing outside of the car, on a dark street in the middle of the night, no less) and he smelled "the scent of burnt cannabis emitting from inside the vehicle" (notably, no cannabis was ever found, despite Gruber's apparent,

superlative night vision); when Gruber found pills in Manuel's pocket "Manuel began to run away from officers" (although Manuel was in the actual physical custody of Gruber); Gruber "knew the pills to be ecstasy"; and "the pills did test positive for ecstasy" (although the pills were not ecstasy, as later determined by the state police). C.A. Sep. Jt. App. 22-24, 45, 113-14. In addition to fabricating the field test results, the police report omitted the fact that cannabis was never found in the car or at the scene of the incident. C.A. Sep. Jt. App. 22-23, 113-14.

That same day, March 18, 2011, Manuel was booked and sent to the county jail. C.A. Sep. Jt. App. 65. During Manuel's incarceration, the aforementioned Joliet police officers continued to knowingly falsify and fabricate evidence to ensure that no one questioned Manuel's continued imprisonment. C.A. Sep. Jt. App. 103. During his grand jury testimony on March 30, 2011, Gruber repeated the fabricated information from the police report by testifying that the pills found in Manuel's pocket tested positive for ecstasy and that he had smelled burnt cannabis as he approached the car. C.A. Sep. Jt. App. 116-21. Manuel was arraigned on April 8, 2011,[1] on the basis of Gruber's grand jury testimony and the fabricated, and omitted, evidence in the police report. C.A. Sep. Jt. App. 103. Manuel's detention continued beyond arraignment. *Id.* The prosecutor also relied upon the fabricated information received from the aforementioned Joliet

[1]Although this is the date of Manuel's arraignment, Manuel was subject to legal process prior to arraignment; however, the exact date is not contained within the record below. As Respondents noted in their appellate court response brief: "Although [arraignment] is not the time at which he became subject to legal process, it is the only date provided relative to the judicial proceedings." C.A. Resp't Resp. Br. 8-9, ECF No. 24. However, the date of legal process is irrelevant at this stage because Manuel's statute of limitations began when the charges terminated in his favor. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action."); *Johnson*, 575 F.3d at 659 (listing the common law elements of a malicious prosecution claim in Illinois, including that the charges terminate in favor of the plaintiff).

police officer to prosecute Manuel. *Id.*

A state police lab report dated April 1, 2011, a week before Manuel's arraignment, found that the pills were not a controlled substance. C.A. Sep. Jt. App. 48. Yet, he was still arraigned and it was not until May 4, 2011, that the prosecutor motioned for a dismissal of the charges based on the lab report. C.A. Sep. Jt. App. 28, 65. Based on that motion, the judge dropped the charges and ordered them *nolle prosequi* (i.e., unwilling to pursue or prosecute) on May 4, 2011. C.A. Sep. Jt. App. 44, 65. Manuel was released from jail the next day, twenty-six days after his arraignment and seven weeks after his arrest. C.A. Sep. Jt. App. 65, 103.

During his incarceration, Manuel could not work or complete his college coursework. C.A. Sep. Jt. App. 27. As a result, Manuel had to drop his college courses; he was nonetheless forced to pay for the dropped classes. *Id.* While he was in jail he could not pay his bills, including his student loans and other bills. *Id.* When these bills came due he defaulted on them; some of the bills were sent to collection agencies which affected his credit score. *Id.* He also suffered harm to his reputation. C.A. Sep. Jt. App. 66.

B. Procedural History

Manuel filed a *pro se* complaint for the present action on April 10, 2013. C.A. Sep. Jt. App. 34. With the assistance of appointed counsel, Manuel filed a First Amended Complaint on September 20, 2013; the First Amended Complaint alleged that Manuel suffered injuries as a result of various civil rights violations, including malicious prosecution, which arose out of the Joliet police officers' and Will County Sheriff's Office employees' actions from March 18, 2011 until May 5, 2011. C.A. Sep. Jt. App. 55-80.

On December 4, 2013, the City of Joliet and the six named Joliet police officers ("Respondents") filed a motion to dismiss, alleging that Manuel's claims were time barred. C.A.

Sep. Jt. App. 81-86.[2] Manuel filed a response to the motions to dismiss on January 8, 2014, and upon request of the District Court, filed a modified response on February 7, 2014. C.A. Sep. Jt. App. 87-99, 101-21; No. 13-CV-3022 (N.D. Ill. Feb. 7, 2014), ECF No. 40, 41. On February 12, 2014, the District Court entered a Memorandum Order granting the Respondents' motion to dismiss, holding that "the limitations bar erected by Section 1983 cannot be overcome by a nonviable Illinois-based federal malicious prosecution claim[.]" Pet. App. B-3. The District Court acknowledged that the Seventh Circuit was an outlier on the issue presented by Manuel but stated:

> What Manuel's counsel must argue then—and they do with vigor—is that *Newsome* should be revisited and "rejected in the present case."
>
> This Court likewise rejects the invitation by Manuel's counsel to create still another topsy-turvy world—if a change from *Newsome* and its progeny is to be made, it must be left to our Court of Appeals to do so.

Pet. App. B-2, B-3.

On March 14, 2014, Manuel timely appealed the dismissal of his case to the U.S. Court of Appeals for the Seventh Circuit against the Respondents. No. 13-CV-3022 (N.D. Ill. March 14, 2014), ECF No. 47, 48. On January 28, 2015, the Seventh Circuit Court of Appeals, in a *per curiam* decision, affirmed its holding in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2010), and held that a Section 1983 malicious prosecution was not cognizable under the Fourth Amendment. Pet. App. A-1-A-5. The Seventh Circuit also acknowledged its status as an outlier among the circuits but stated: "While Manuel's counsel advanced a strong argument, given the position we

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[2] On December 9, 2013, the Will County Sheriff defendants also filed a motion to dismiss. No. 13-CV-3022 (N.D. Ill. Dec. 9, 2013), ECF No. 32, 33. The District Court granted the Will County Sheriff defendants' motion to dismiss on January 13, 2014. C.A. Sep. Jt. App. 14; No. 13-CV-3022 (N.D. Ill. Jan. 13, 2014), ECF No. 39. Petitioner does not appeal the dismissal of the Will County defendants.

have consistently taken in upholding *Newsome*, Manuel's argument is better left for the Supreme Court." Pet. App. A-3-A-4.

In light of the deep divisions between the Seventh Circuit and the ten other circuits, Manuel should be given an answer that is not merely based upon a Seventh Circuit precedent which has been repeatedly rejected by the other circuits. We ask that this Court definitively provide him with an answer as to the availability of a Fourth Amendment malicious prosecution claim.

REASONS FOR GRANTING THE PETITION

This Court should grant the present petition for a writ of certiorari because: (1) there is a disagreement on this issue among the circuits; (2) the decision below from the Seventh Circuit is on the wrong side of this issue; (3) this issue is a recurring issue of national importance; and (4) this case is an ideal vehicle to decide the issue.

I. The Circuits Disagree About the Availability of a Fourth Amendment Malicious Prosecution Action.

A. *Albright* Advanced the Fourth Amendment Approach.

The division between the Seventh Circuit and the ten other circuits that have ruled on this issue arises out of this Court's decision in *Albright v. Oliver,* 510 U.S. 266 (1994). In *Albright*, a plurality of this Court expressly held that Albright should have brought his malicious prosecution claim as a Fourth Amendment claim rather than as a due process claim. *Albright*, 510 U.S. at 271 ("We hold that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged."). The plurality reasoned that "where a particular Amendment provides an explicit textual source for a constitutional protection," such Amendment

should be relied upon rather than a more generalized notion of due process. *Id.* at 273 (internal citations omitted). Further, the plurality noted that this Court has, in the past, held that the Fourth Amendment regulates criminal prosecutions that result in liberty deprivations. *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

Justice Souter, who concurred in the judgment but did not join in the plurality opinion, also noted that Albright's facts stated a Fourth Amendment claim. Justice Souter further noted that the boundaries of substantive due process did not need to expand to cover Albright's facts because: "[Albright's] case calls for no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already." *Albright*, 510 U.S. at 288-89 (Souter, J., concurring). He noted that recognizing a Fourth Amendment claim for malicious prosecution in Albright's circumstance was not novel because many courts of appeals previously recognized such a claim.

> "Indeed, it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment, since injuries usually occur only after an arrest or other Fourth Amendment seizure, an event that normally follows promptly (three days in this case) upon the formality of filing an indictment, information or complaint."

Id. at 290. (Souter, J., concurring).

Writing separately in a concurring opinion, Justice Kennedy, joined by Justice Thomas, agreed with the plurality opinion that Albright did not state a claim for a substantive due process violation. *Id.* at 283. (Kennedy, J. concurring, joined by Thomas, J.) (opining that substantive due process does not protect against criminal prosecution without probable cause). However, Justice Kennedy further opined that Albright may have stated a claim for a procedural due process violation. Justice Kennedy also noted that, under Supreme Court jurisprudence, Section 1983 only provides a remedy for procedural due process violations if state law does not provide

an adequate post-deprivation remedy. *Id.* at 283-84 (citing *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981)).

After *Albright*, an overwhelming majority of the courts of appeal have adopted the approach advanced by the plurality and Justice Souter—malicious prosecution accompanied by a liberty deprivation constitutes a Fourth Amendment violation, cognizable through Section 1983. However, the Seventh Circuit adopted Justice Kennedy's approach by holding that a malicious prosecution claim is only cognizable as a Section 1983 procedural due process claim if state law does not provide an adequate remedy. *Newsome*, 256 F.3d 747, 751 (7th Cir. 2001).

B. Ten Federal Circuits Correctly Hold That Malicious Prosecution is Actionable as a Fourth Amendment, Section 1983 Claim.

After *Albright*, eight circuit courts of appeals have expressly held that legal process, such as an arraignment, does not end a plaintiff's Fourth Amendment right to be free from unreasonable seizure. "There is now broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period " *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (compiling cases). These eight circuits have held that malicious prosecution is cognizable through a Section 1983 Fourth Amendment claim. *See id.*, *see also Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013) ("[W]e have said, to be actionable under section 1983, there must be a post-arraignment seizure, the claim being grounded ultimately on the Fourth Amendment's prohibition of unreasonable seizure."); *Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010) ("In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and must establish the elements of a malicious prosecution claim under state law."); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3d Cir. 2009) ("To prevail on a malicious prosecution claim under section 1983, a plaintiff

must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding."); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("[A] malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort.") (quoting *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000)); *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) ("The Sixth Circuit recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment, which encompasses wrongful investigation, prosecution, conviction, and incarceration.") (internal quotations omitted) (citing *Barnes v. Wright*, 449 F.3d 709, 715–16 (6th Cir. 2006)); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257-58 (10th Cir. 2007) ("In this circuit, when addressing § 1983 malicious prosecution claims, we use the common law elements of malicious prosecution as the starting point of our analysis; however, the ultimate question is whether plaintiff has proven the deprivation of a constitutional right. We look to both the Fourth and Fourteenth Amendments.") (internal quotations omitted); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) (identifying "malicious prosecution as a violation of the Fourth Amendment and a viable constitutional tort cognizable under § 1983"); *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007).

The Fifth and Ninth Circuits have also implicitly recognized a Section 1983 malicious prosecution claim. *See Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc) ("[W]e adhere to the view that the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution."). *Awabdy v. City of*

Adelanto, 368 F.3d 1062, 1069 (9th Cir. 2004) ("We do not interpret *Albright* as establishing a rule that Fourth Amendment violations are the only proper grounds for malicious prosecution claims under § 1983. . . . [W]e have continued to follow our earlier precedents establishing that malicious prosecution with the intent to deprive a person of equal protection of the law or otherwise to subject a person to a denial of constitutional rights is cognizable under § 1983.") (internal quotations omitted). The Eighth Circuit has not explicitly ruled on the issue. *Kurtz v. City of Shrewsbury*, 245 F.3d 753 (8th Cir. 2001).[3]

C. The Seventh Circuit Wrongly Holds That Malicious Prosecution is Only Actionable as a Procedural Due Process, Section 1983 Claim.

In stark contrast to all of the other circuits that have considered this issue, the Seventh Circuit stubbornly refuses to recognize a federal malicious prosecution claim grounded on the Fourth Amendment, based not on principles of constitutional law, but on a misreading of *Albright*. The Seventh Circuit interpreted this Court's splintered opinion in *Albright v. Oliver* to mean that an individual with an adequate state law remedy does not have a federal malicious

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[3] The Eighth Circuit has held that it will not recognize a Section 1983 malicious prosecution claim that "does not allege a constitutional injury." *Kurtz*, 245 F.3d at 758. However, in both of the leading cases within the Eighth Circuit, the plaintiff involved did not show that the defendant lacked probable cause for the arrest or prosecution, a key element of common law malicious prosecution as well as any Fourth Amendment claim. *Id.at 757; Joseph v. Allen*, 712 F.3d 1222, 1226-28 (8th Cir. 2001).

More recently, the Eighth Circuit opened itself to the possibility of a Fourth Amendment malicious prosecution claim, but did not explicitly rule on the issue. *Harrington v. City of Council Bluffs, Iowa* 678 F.3d 676, 679, 680 (8th Cir. 2012) ("If malicious prosecution is a constitutional violation at all, it probably arises under the Fourth Amendment. . . . Our sister circuits have taken a variety of approaches on the issue of whether or when malicious prosecution violates the Fourth Amendment. We need not enter this debate now.") (internal citations omitted).

prosecution claim. *Newsome*, 256 F.3d at 750-51 (interpreting *Albright v. Oliver*, 510 U.S. 266 (1994)).

II. The Decision Below is Wrong.

A. The Seventh Circuit's Rule Raises Constitutional Concerns.

The Seventh Circuit's decision in *Newsome* and in the instant case are contrary to the notion that the Fourth Amendment protects against liberty deprivations pending trial. The Seventh Circuit's rule, therefore, is contrary to the Constitution and this Court's Fourth Amendment jurisprudence.

In *Gerstein*, this Court held that a neutral and detached magistrate must make a probable cause determination to hold a criminal suspect. *Gerstein*, 420 U.S. at 112. An individual cannot be held indefinitely on just a police officer or prosecutor's subjective belief in probable cause. The holding in *Gerstein* was based squarely on the guarantees of the Fourth Amendment. As this Court explained: "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always had been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Gerstein*, 420 U.S. at 124, n.27 (1975). Thus, an individual has a Fourth Amendment right to a neutral determination of probable cause before an extended restraint of liberty following arrest. This Fourth Amendment right is subverted when, as in this case, police officers intentionally present fabricated and falsified information. The very purpose of a probable cause determination by a neutral judge is undermined and the Fourth Amendment is violated.

This logical reliance on *Gerstein* is supported by the Framers' original intent. As this Court noted: "the Framers considered the matter of pretrial deprivations of liberty and drafted the

Fourth Amendment to address it." *Albright*, 510 U.S. at 274. The Framers originally drafted the Fourth Amendment in an era when the British imperial powers would produce generalized warrants and use the warrants as a basis for property searches and seizures and arrest. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 675-76 (1999).

Today, abuse of the legal system manifests itself in the issuance of a probable cause determination on the basis of fabricated evidence. When a police officer presents false information which forms the basis of a neutral magistrate's probable cause determination, the Fourth Amendment is still at stake. Therefore, the Seventh Circuit decision below and in *Newsome* strip individuals of their Fourth Amendment rights and, instead, only provide such individuals with a nebulous procedural due process right.

Fortunately, the vast majority of the circuits have upheld this Court's Fourth Amendment jurisprudence and rule in *Gerstein*. Such courts have held that a Fourth Amendment malicious prosecution claim will exist both when an individual is first seized *before* legal process (*Pitt*, 491 F.3d at 510-12), and *after* legal process (*Hernandez-Cuevas*, 723 F.3d at 99-100).

For example, in *Pitt*, a case factually similar to the present case, the D.C. Circuit held that the plaintiff, Pitt, had viable claims for both a Fourth Amendment false arrest and a Fourth Amendment malicious prosecution claim. *Pitt*, 491 F.3d at 508-12. Pitt was arrested without a warrant or probable cause (giving rise to his false arrest claim). *Id.* at 499, 508-09. After the arrest, one of the police officers who arrested Pitt then gave the prosecutors an affidavit which included a detailed description of the robbery but omitted identifications exonerating Pitt as well as Pitt's alibi. *Id.* at 499. The next day, based upon the affidavit, a magistrate ordered Pitt committed to a halfway house where he was held for ten days. *Id.* at 499-500. Pitt brought Fourth Amendment causes of action for both false arrest and malicious prosecution under Section 1983.

The court held that Pitt had a cognizable Fourth Amendment false arrest claim after his arrest, *and* a cognizable Fourth Amendment malicious prosecution claim after he was held pursuant to legal process at the halfway house for ten days without probable cause. *See Pitt*, 491 F.3d at 499-500, 510-11. The court held that Pitt suffered a seizure after the magistrate ordered him detained at the halfway house even though he was already in custody after his arrest. *Id.*

Also, in *Hernandez-Cuevas*, a magistrate judge issued a warrant for Hernandez-Cuevas on the basis of a false identification from Taylor, an FBI agent. *Hernandez-Cuevas*, 723 F.3d at 95. The First Circuit held that Hernandez-Cuevas had a Fourth Amendment malicious prosecution claim stating: "Though the Fifth and Sixth Amendments generally control events following the arrest and arraignment of an individual accused of committing a crime, we are convinced that an individual does not lose his Fourth Amendment right to be free from unreasonable seizure when he becomes detained pursuant to judicial process." *Id.* at 99-100.

The First and D.C. Circuits correctly held that the Fourth Amendment covers post-legal process malicious prosecution claims, not just false arrest. Ten courts of appeal recognize, post-*Albright*, that the Fourth Amendment covers malicious prosecution claims if such a claim includes a liberty deprivation absent probable cause. The Seventh Circuit's contrary holding that the Fourth Amendment does not cover the full period of pretrial deprivations produces an unreasonable gap in an individual's constitutional protections. *See* John T. Ryan, Jr., Note, *Malicious Prosecution Claims under Section 1983: Do citizens have federal recourse?* 64 GEO. WASH. L. REV. 776, 808 (1996) ("[T]here potentially exists a gap in constitutional protection for instances of intentional official misconduct, at least in the Seventh Circuit."). In sum, the Seventh Circuit's decision to deny Manuel a Fourth Amendment malicious prosecution claim is contrary to the Constitution.

We do acknowledge that the Seventh Circuit does not totally foreclose an individual from seeking redress for a post-legal process deprivation of liberty. The Seventh Circuit allows for a procedural due process claim if such individual does not have an adequate state remedy. However, this Court has made clear that: "Where a particular Amendment provides an explicit textual source for a constitutional protection," such Amendment should be relied upon rather than a more generalized notion of due process. *Albright,* 510 U.S. at 266 (internal citations omitted).

B. The Seventh Circuit Improperly Derived a Holding from the Plurality Decision in *Albright.*

The Seventh Circuit holding is not based on any analysis of Fourth Amendment jurisprudence but, rather, a misreading of the various opinions in *Albright v. Oliver*. The Seventh Circuit interpreted these splintered opinions to mean that an individual with an adequate state law remedy does not have relief for a malicious prosecution claim through Section 1983. *Newsome,* 256, F.3d at 750-751 (citing *Albright*, 510 U.S. 266 (1994)). However, *Albright* did not preclude a Fourth Amendment claim based upon malicious prosecution as the petitioner, Albright, did not bring such a claim and the Justices did not decide the issue.

A majority of the Justices in *Albright* agreed that a plaintiff seeking relief for a constitutional infringement should seek relief under an express constitutional provision, if available, rather than bringing a claim for substantive due process. *Albright,* 510 U.S. at 271-72, 275-76 (Rehnquist, C.J., joined by O'Connor, Scalia, & Ginsburg, JJ.) (Scalia, J., concurring) (Ginsburg, J., concurring) (Souter, J., concurring). The four Justice plurality opinion stated that the petitioner in *Albright*, by bringing a malicious prosecution claim, did not sufficiently allege a substantive due process constitutional infringement. *Id.* at 275.

Writing separately in a concurring opinion, Justice Kennedy, joined by Justice Thomas, agreed. *Id.* at 283. (Kennedy, J. concurring, joined by Thomas, J.) (opining that substantive due process does not protect against criminal prosecution without probable cause). Justice Kennedy further opined that, although Albright did not state a claim for a violation of substantive due process, he may have stated a claim for a violation of procedural due process. However, Justice Kennedy noted that, under Supreme Court jurisprudence, Section 1983 only provides a remedy for violations of procedural due process of a liberty interest if state law does not provide an adequate post-deprivation remedy. *Id.* at 283-84 (*citing Parratt*, 451 U.S. at 535-44).

The Seventh Circuit considers Justice Kennedy's decision as the "narrowest grounds of decision", citing to *Marks v. United States,* with no actual analysis of the decision or its applicability to the *Albright* decision. In a different opinion addressing a different issue, the Seventh Circuit, as other courts of appeal have done, analyzed in detail the limited usefulness of the *Marks* rule.

> When, however, a concurrence that provides the fifth vote necessary to reach a majority does not provide a 'common denominator' for the judgment, the *Marks* rule does not help to resolve the ultimate question. This means that *Marks* applies only when one opinion is a logical subset of other, broader opinions. When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.

Gibson v. Am. Cyanamid Co., 760 F.3d 600, 619 (7th Cir. 2014) (internal citations and quotations omitted) *petition for cert. filed* (U.S. Jan. 16, 2015), No. 14-849.

In *Marks,* the opinions compiled for a holding all analyzed the same constitutional provision (the First Amendment). *Id.* (citing *Marks. v. U.S.*, 430 U.S. 188 (1977)). It would be impossible to apply the *Marks* rule to plurality and concurring opinions that interpret two different constitutional provisions (for example, procedural due process and substantive due

process) to furnish a disposition as to the applicability of a Fourth Amendment malicious prosecution claim as the Seventh Circuit did in *Newsome*. As the Seventh Circuit itself phrased it: "Asking which opinion is narrower than the other would be like examining a square with a width that is the same length as the diameter of a circle, and futilely asking which is narrower, the square or the circle." *Gibson*, 760 F.3d at 619. Justice Kennedy's concurring opinion, agreeing with the plurality that Albright did not have a substantive due process right to be free from malicious prosecution, did not narrow the plurality's opinion but instead went beyond the reach of the plurality opinion by examining Albright's claim as a procedural due process claim.

Instead, only one rule can be extrapolated from the opinions of the plurality and Justice Kennedy: there is no substantive due process right to be free from prosecution, but upon probable cause. On the other hand, one can extrapolate from the plurality opinion and Justice Souter's concurrence that the facts in this case constitute a Fourth Amendment claim because Manuel suffered a pretrial deprivation of liberty. The plurality stated that pretrial deprivations of liberty are governed by the Fourth Amendment. *Albright*, 510 U.S. at 274. "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.* (plurality opinion). This means that the Fourth Amendment governs not just arrest but also criminal prosecutions. *Id.* "We have in the past noted that the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* (citing *Gerstein*, 420 U.S. at 114.). Justice Souter agreed with this analysis. He noted that Albright's facts form the basis of the long-held notions of the Fourth Amendment. "Indeed it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment seizure, an event that normally follows promptly (three days in this case) upon the formality of filing an indictment, information or complaint." *Id.* at 290.

Therefore, contrary to the reasoning of the Seventh Circuit, it can safely be said that five Justices did not rule out the possibility of a Fourth Amendment malicious prosecution claim. As a result, the Seventh Circuit improperly drew a rule on the unavailability of a Fourth Amendment claim from Justice Kennedy's concurring opinion. If the Seventh Circuit wanted to rely on the rule in *Marks v. United States*, it should have analyzed Justice Souter's concurrence as the "narrowest grounds" on which a majority of the justices agreed. *Marks*, 430 U.S. at 193. At the very least, it should have acknowledged that this Court has not yet determined whether or not such claims are cognizable through the Fourth Amendment or procedural due process. The Seventh Circuit would have then analyzed *Albright* correctly, although it still would have reached the wrong result.

III. This Recurring Issue Is of National Importance.

The availability of a malicious prosecution claim is a recurring issue of national importance. It will continue to be a recurring issue for the circuit courts until this Court decides the issue: "Because of the absence of an opinion of the Court [in *Albright*] and the conflicting views of those Justices who only concurred in the judgment, the issue of the availability of § 1983 to pursue malicious prosecution-type claims will continue to be an area of uncertainty." STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 3:11 (2014). Providing an answer is important, however, because the courts of appeals continue to be divided on the issue and the "divergent application of Section 1983 claims based merely on geography is contrary to the need for uniform interpretation of federal law." Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA. L. REV. 1635, 1636 (2013).

Further, the continuation of an individual's Fourth Amendment right beyond legal

process is an issue of national importance for several reasons. Recognition of a Section 1983 malicious prosecution claim has several advantages to a Section 1983 false arrest claim. A Fourth Amendment claim for malicious prosecution provides an individual with remedies for damages he would not otherwise have for a false arrest or false imprisonment claim. John R. Williams, *Beyond Police Misconduct and False Arrest*, 8 SUFFOLK J. TR. APP. ADVOCACY 39, 42 (2003) [hereinafter Williams, *Beyond Police Misconduct*]. An individual who is the target of malicious prosecution will have access to damages from legal process until the charges terminate in his or her favor (assuming only a pretrial deprivation of liberty), a period of time that can stretch into many months. *Id.* On the other hand, false arrest usually only lasts for a few days, before legal process cuts it off. *Id.*

As the Seventh Circuit itself acknowledged in a case involving an Indiana prosecution: "[Julian] could have sued for false arrest. But such charges would not give rise to *adequate* remedies for the wrongs that Julian alleges." *Julian*, 732 F.3d at 846 (emphasis in original). There, the court recognized that the damages attributable to false arrest or imprisonment are usually quite small when compared with the damages attributable to malicious prosecution. *Id.* at 846-47 In the present case, Petitioner Manuel was held, unlawfully, for only a few days prior to his legal process. However, he was held without probable cause for a total of seven weeks.

Because of the added length of the seizure, a malicious prosecution claim encompasses a greater variety of injuries: "The plaintiff [in a malicious prosecution suit] may recover compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society of his family." W PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 119, at 887-88 (5th ed. 1984). As in the present case, the longer Manuel remained in jail, the more injuries he suffered. His time in jail prior to legal

process, for just a few days, would not have had such a large impact on his work, his college coursework, and his credit score as his post-legal process detention did.

Additionally, "malicious prosecution claims purvey a forgiving statute of limitations" as the claims do not accrue until the charges terminate in the plaintiff's favor. Williams, *Beyond Police Misconduct*, 43. In the present case, the availability of a malicious prosecution claim and its statute of limitations will determine Manuel's fate. Finally, malicious prosecution allows a plaintiff damages for a claim which might otherwise have been dismissed due to common law immunity. *Id.* For example, a police officer who lies before a grand jury has immunity for his perjury. *Id.* However, the victim will still have a malicious prosecution claim on the basis of the results of the perjury. *Id.* Because of these three key differences, we cannot overstate the importance of access to a federal malicious prosecution claim.

Furthermore, the availability of a Fourth Amendment malicious prosecution claim is also an issue of national importance because of the socio-economic and racial disparities which plague our nation's criminal justice system. Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV 202, 202-03 (2007). Prosecutors and police officers hold a great deal of power in criminal prosecutions. *Id.* at 205-06. They can easily fabricate and falsify evidence to present the appearance of probable cause before a neutral judge. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 86 (2005). In the case of countless malicious prosecution claims, government actors have intruded on individuals' Fourth Amendment rights for malicious and racist reasons. *See, e.g., Jones v. City of Chicago*, 856 F.2d 985, 990-91 (7th Cir. 1988).

In *Jones*, George Jones brought a malicious prosecution claim after being charged with rape and murder on the basis of almost no evidence and in light of a number of statements from

one victim denying that Jones was the perpetrator. *Id.* at 988-90. The victim's statements exonerating Jones as well as other exonerating physical evidence were either placed in the police's street files, files which were purposely not handed over to the prosecutor or defense attorney. *Id.* at 989, 991. Jones was exonerated only because of the efforts of one lone police officer, Laverty, who adhered to the principles of "honesty, decency, and justice." *Id.* at 991. Laverty's co-workers threatened to destroy his career if he reported the exonerating evidence. *Id.* at 990. When, despite these threats, he proceeded to write a report with the truth, his report was put in a drawer. *Id.* at 990-91. When he discovered the trial was proceeding, he had the courage to call the court and Jones' defense attorney to report the exonerating information that had been hidden away in undisclosed "street files." *Id.* at 991. The court declared a mistrial and the prosecutor eventually dropped the charges. *Id.* The police department disciplined Laverty for his conduct and destroyed his career. *Id.* We note that had *Jones* arisen after *Albright*, the Seventh Circuit would have reversed the jury verdict in Jones' favor and dismissed his complaint. We also note that, although the heinous treatment of Jones is the stuff about which movies are made and books are written, Manuel spent almost twice as long in jail as Jones did.

Cases like Jones' and other recent events from around the country have called into the question the legitimacy of the criminal justice system. *See* Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV BLACKLETTER L.J. 127, 137 (2003). "Many subjects to the system believe they are being discriminated against, and large segments of the population distrust the system. This stems partially from a history of criminal law as an oppressive tool used against minority groups" but also from more recent incidents which favor police discretion over the life and liberty of black suspects. *Id.* Police misconduct destroys the legitimacy of the criminal justice

system, especially for the low-income and minority groups who believe that they have been disenfranchised by the system. Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 152 (1998). Such misconduct lessens community trust in authority and "makes the job of delivering police services more dangerous and less effective." *Stop and Frisk in Chicago*, ACLU OF ILL., *available at* http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf, 3 (March 2015).

In *Gerstein*, this Court recognized this larger issue when it quoted Justice Frankfurter:

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

Gerstein v. Pugh, 420 U.S. 103, 118 (1975).

Although the impact of police misconduct and abuse of power may fall more frequently on the poor and people of color, police misconduct knows no bounds. No one is immune. Police misconduct can occur regardless of the victim's socio-economic status or race. Some of the leading cases on this Fourth Amendment issue involve apparent middle class victims who were deprived of their liberty despite not even being involved in a crime.

For example, in *Kingsland v. City of Miami*, a young woman was involved in an automobile accident with an off-duty police officer. 382 F.3d 1220, 1223 (11th Cir. 2004). In an apparent effort to cover up the off-duty officer's negligence, the reporting police officers arrested and detained the young woman, alleging that she showed signs of impairment and was driving under the influence. *Id.* at 1225. Although two breathalyzer tests showed a .00 blood alcohol content, the police officers said she smelled of cannabis. *Id.* at 1224. Although her vehicle was never searched for cannabis and a urinalysis came back negative for cannabis, she was,

remarkably, still charged with driving under the influence. *Id.* at 1125. The charges against her were eventually dropped. *Id.* Even though she was an apparent victim of malicious prosecution, the 11th Circuit held that Kingsland's two trips from New Jersey to Florida to appear for pre-trial hearings did not constitute a seizure within the meaning of the Fourth Amendment. *Id.* at 1236.

Similarly, in *Swartz v. Insogna*, Swartz gave a police officer the middle finger while both were in their respective vehicles. *Swartz*, 704 F.3d at 108. The police officer followed Swartz to his destination and arrested him for "disorderly conduct." *Id.* The Second Circuit held that raising a middle finger did not qualify as disorderly conduct and prosecuting Swartz in such a manner equated to malicious prosecution. *Id.* at 111-12. Here, an apparent middle class individual was afforded the benefits of a malicious prosecution claim based on geography (i.e., he suffered malicious prosecution within the Second Circuit and not the Seventh Circuit).

The very purpose of the Fourth Amendment is to protect our country's citizens from this type of misconduct and abuse of power. Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement that Purpose*, 48 U. RICH. L. REV 479, 497, 512 (2014). It is the role of our federal judiciary to ensure that federal remedies serve as a deterrent against such abuses of power, especially on the basis of race or socio-economic status. Even the Seventh Circuit agrees. As it stated in *Newsome*: "Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution." *Newsome*, 256 F.3d at 752. Therefore, the availability of a malicious prosecution claim grounded in the Fourth Amendment is a key issue facing this nation's criminal justice system.

IV. This Case is an Ideal Vehicle to Decide the Conflict.

This case is an ideal vehicle to decide the conflict because the facts clearly demonstrate that Manuel would have access to a Fourth Amendment malicious prosecution claim under all formulations of the claim in all of the circuits where it is recognized. Manuel, after all, was subject to a true seizure–prison–without probable cause.

Moreover, based upon the legal posture of this case, Manuel's malicious prosecution claim can only succeed as a Fourth Amendment claim. Manuel filed his claims, *pro se*, more than two years after his arrest, unaware of the Maginot Line of various statutes of limitations standing in his path. Although he had a Section 1983 false arrest and imprisonment claim, these claims were barred by the statute of limitations. Pet. App. A-2 ("The court dismissed most of the § 1983 claims as time barred."). Manuel also does not have a procedural due process Section 1983 for malicious prosecution claim because he has an adequate state law remedy. Pet. App. A-4 ("Only if state law fails to provide an adequate remedy can a plaintiff pursue a federal due process claim for malicious prosecution and Illinois has an adequate remedy."). But his state malicious prosecution claim is also barred due to Illinois' one-year statute of limitations for actions against local government officials and entities. *See* 745 ILCS 10/8-101.

Therefore, if Manuel is to have an opportunity to be compensated for his injuries, Manuel must turn to the Fourth Amendment as a means to bring a Section 1983 malicious prosecution claim. A malicious prosecution claim does not accrue, and thus the statute of limitations does not begin to run, until the criminal charges giving rise to the claim terminate in favor of the plaintiff. *Julian*, 732 F.3d at 845 (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994); *see Wallace v. Kato*, 549 U.S. at 388 ("[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action.") (internal quotations omitted); *Johnson*, 575 F.3d at 659

(listing the common law elements of a malicious prosecution claim in Illinois, including that the charges terminate in favor of the plaintiff).

Finally, the Seventh Circuit expressly reaffirmed its decision in *Newsome* and explicitly ruled in its opinion below that it does not recognize a Fourth Amendment malicious prosecution claim. Time and time again, the Seventh Circuit has been given the opportunity to recognize a Fourth Amendment malicious prosecution claim. On many occasions, the Seventh Circuit dodged the issue. First, in *Newsome*, the Court adopted the rule that an individual only has a Section 1983 malicious prosecution claim if state law fails to provide an adequate remedy. *Newsome*, 256 F.3d at 750-51. However, the court later noted: "*Newsome* left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors." *Johnson*, 575 F.3d at 663. Then, in *Julian v. Hanna*, the Seventh Circuit was given the opportunity to reexamine its outlier stance but it chose not to do so. *Julian*, 732 F.3d at 846. Instead, as Judge Posner wrote in *Julian*, the facts would give Julian a claim under both the Fourth Amendment and the due process clause, or neither. *Id.* For that reason, the court opted not to decide the Fourth Amendment issue.[4] *Id.*

In *Llovet v. City of Chicago*, an Illinois case involving a different factual situation than the instant case, the Seventh Circuit was again given the opportunity to revisit *Newsome*. In *Llovet*, the plaintiff acknowledged that he was arrested, upon probable cause, for a misdemeanor. Llovet further alleged, however, that his detention was unreasonably prolonged when he was charged, without probable cause, for a more serious felony offense. *Llovet v. City of Chicago*, 761 F.3d 759, 762 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1185 (2015). Judge Posner, again

[4] As the malicious prosecution at issue in *Julian* took place in Indiana, a state without an adequate state law remedy, the Seventh Circuit granted Julian Section 1983 relief.

writing for the court, acknowledged that "most federal courts of appeals hold that section 1983 authorizes a federal claim of malicious prosecution, regardless of what alternative remedy a state provides." *Id.* at 761. Instead of adopting the majority rule or embracing its outlier status, the Seventh Circuit avoided the issue again by saying that it was "no outlier." *Id.* at 763. It was not until the opinion below that the Seventh Circuit finally, and openly, reaffirmed its *Newsome* holding. Pet. App. A-3.

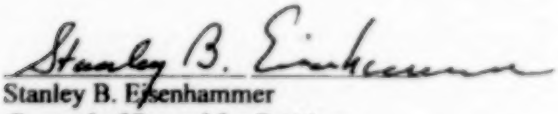
The facts in the present case are different from the facts in *Llovet*. As the Seventh Circuit acknowledged: "*Llovet* is largely about the theory of 'continuing seizures' and thus distinguishable from Manuel's facts." Pet. App. A-4. Petitioner Manuel was arrested without probable cause, in violation of the Fourth Amendment, and was held pursuant to legal process without probable cause, again in violation of the Fourth Amendment. The Seventh Circuit long attempted to evade the impact of its decision in *Newsome* but, when faced with the facts in the present case, it could no longer do so, holding: "When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." Pet. App. A-3 (internal citations omitted). Instead of again evading the issue, the Seventh Circuit openly rejected a Fourth Amendment malicious prosecution claim. Now that the Seventh Circuit has explicitly rejected recognizing such a claim, even when the plaintiff is seized without probable cause, this Court should take the opportunity to decide whether or not such a claim exists.

Therefore, this case is the ideal vehicle to decide this issue not only because of the facts involved in Manuel's malicious prosecution, including his true liberty deprivation, but also because the Seventh Circuit has finally acknowledged and affirmed its outlier status.

CONCLUSION

In *Albright v. Oliver*, a majority of this Court found that Albright's claim should be analyzed under the Fourth Amendment. The Court, however, did not answer the question the Petitioner brings forth today because Albright failed to raise the question in his appeal. Petitioner is here because, contrary to ten other circuits, the Seventh Circuit chose to adhere to the concurring opinion of only two of the Justices in *Albright*. Therefore, we respectfully request that this Court grant this petition for a writ of certiorari to resolve a recurring issue of national importance and to settle the long-standing conflict among the circuit courts of appeal as to the availability of a Fourth Amendment malicious prosecution claim. Until this Court takes up the issue, a victim's access to a federal remedy for a violation of his Fourth Amendment right to be free from unreasonable seizure will continue to be determined by the happenstance of geography.

Respectfully submitted,



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NO._____

In The
Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued December 16, 2014
Decided January 28, 2015

Before

DIANE P WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 14-1581

ELIJAH MANUEL,
Plaintiff-Appellant,

v.

CITY OF JOLIET, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13 C 3022

Milton I. Shadur,
Judge.

ORDER

Elijah Manuel appeals the dismissal of his complaint under 42 U.S.C. § 1983 alleging that the City of Joliet and several of its police officers maliciously prosecuted him when they falsified the results of drug tests and then arrested him for possession with intent to distribute ecstasy. The district court dismissed his claim as foreclosed by *Newsome v. McCabe*, 256 F.3d 747, 750–52 (7th Cir. 2001), because Illinois law already provided an adequate remedy for malicious prosecution. Manuel asks this court to reconsider *Newsome* but offers no compelling reason to do so. We affirm.

Manuel alleged the following in connection with his arrest on March 18, 2011 for possession with intent to distribute ecstasy. On that day he was a passenger in his car

being driven by his brother when they were stopped for failing to signal. A police officer detected an odor of burnt cannabis from inside the car. Without warning, the officer flung open the passenger's door and dragged Manuel out. The officer pushed Manuel to the ground, handcuffed him, and then punched and kicked him. The officer then patted down Manuel, and in one pocket found a bottle of pills. The pills were then tested by officers who had arrived at the scene, and these officers falsified the results to show that the pills were ecstasy. Based on these results, Manuel was arrested. In grand jury proceedings on March 31, the police continued to lie about the test results.

But according to a lab report of April 1, 2011, that Manuel submitted with his complaint, the pills were not ecstasy. Yet Manuel was arraigned on April 8, 2011, and not for more than a month—until May 4, 2011—did the Assistant State's Attorney seek dismissal of the charges. Manuel was released the next day. Because of his incarceration, Manuel missed work and his college classes, forcing him to drop courses he already paid for.

On April 10, 2013, Manuel sued the City of Joliet and various City of Joliet police officers alleging malicious prosecution because of the falsified drug tests and other civil rights claims that stemmed from his arrest (unreasonable search and seizure, excessive force, violation of due process rights, conspiracy to deprive constitutional rights, unreasonable detention, failure to intervene, and denial of equal protection of laws).

The court dismissed most of the § 1983 claims as time-barred because they fell outside the two-year statute of limitations. As for the malicious-prosecution claim—which was not time-barred because the statute of limitations did not begin tolling until May 4, 2011, when the underlying proceedings were terminated in Manuel's favor—the court treated it as barred under *Newsome* because Illinois law provided an adequate remedy.

On appeal Manuel challenges only the dismissal of his malicious-prosecution claim and argues that the claim, as one in which the police misrepresented evidence, fits into an area of law that *Newsome* did not foreclose. He invokes *Johnson v. Saville*, 576 F.3d 656, 663 (7th Cir. 2009), in which we stated that "*Newsome* left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors."

Newsome held that federal claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment, and thus there is no malicious

prosecution claim under federal law if, as here, state law provides a similar cause of action. *Newsome*, 256 F.3d at 750–51; *see Julian v. Hanna*, 732 F.3d 842, 845–46 (7th Cir. 2013). *Newsome* did not preclude Fourth Amendment claims generally, but we have cautioned that "there is nothing but confusion gained by calling [a] legal theory [brought under the Fourth or any other amendment] 'malicious prosecution.'" *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) (quoting *Newsome*, 256 F.3d at 751) (internal quotation omitted); *see also McCullach v. Gadert*, 344 F.3d 655, 659 (7th Cir. 2003) (recognizing a Fourth Amendment wrongful-arrest claim against an officer who allegedly gave false information in an incident report and at a preliminary hearing). As the district court noted, any Fourth Amendment claim that Manuel might bring is time-barred. Fourth Amendment claims are typically "limited up to the point of arraignment," after which it becomes a malicious prosecution claim. *Bielanski v. County of Kane*, 550 F.3d 632, 638 (7th Cir. 2008). Thus if Manuel has a Fourth Amendment claim not barred by *Newsome*, it would have stemmed from his arrest on March 18, 2011, which he would have had to challenge within two years, *see* 735 ILCS 5/13-202, but he did not sue until April 10, 2013. And in any event, Manuel has no Fourth Amendment right to be free from groundless prosecution. *Bielanski*, 550 F.3d at 638; *Ray v. City of Chicago*, 629 F.3d 660, 664 (7th Cir. 2011).

Next Manuel argues that we should reconsider our holding in *Newsome* and recognize a federal claim for malicious prosecution under the Fourth Amendment regardless of the available state remedy. By his count, ten other circuits have recognized federal malicious-prosecution claims under the Fourth Amendment—assuming that the plaintiff has been seized in the course of the malicious prosecution. *See Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (collecting cases); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 98–99 (1st Cir. 2013) ("there is now broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period.")

Manuel does not provide a compelling reason to overrule our precedent. *See United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. 2010) (setting forth standard for overturning circuit precedent); *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010). As we stated in our most recent endorsement of *Newsome's* rationale: "When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." *Llovet*, 761 F.3d at 764. While Manuel's counsel advanced a strong argument, given the position we have consistently taken in upholding *Newsome*, *see*

Llovet v. City of Chicago, 761 F.3d 759, 760 (7th Cir. 2014); *Ray*, 629 F.3d at 664; *Parish*, 594 F.3d at 554, Manuel's argument is better left for the Supreme Court.

Manuel tries to distinguish *Llovet* on grounds that he was arrested without probable cause and incarcerated for seven weeks. Although *Llovet* is largely about the theory of "continuing seizures" and thus distinguishable from Manuel's facts, we said in that case that "once detention by reason of arrest turns into detention by reason of arraignment...the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process." 761 F.3d at 763. Only if state law fails to provide an adequate remedy can a plaintiff pursue a federal due process claim for malicious prosecution, *id.* at 764; *cf. Julian*, 732 F.3d at 846 (Indiana did not have an adequate remedy for malicious-prosecution claim), and Illinois has an adequate remedy. *Ray*, 629 F.3d at 664.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

January 28, 2015

Before: DIANE P. WOOD, Chief Judge
ILANA DIAMOND ROVNER, Circuit Judge
JOHN DANIEL TINDER, Circuit Judge

No. 14-1581	ELIJAH MANUEL, Plaintiff - Appellant v. CITY OF JOLIET, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:13-cv-03022 **Northern District of Illinois, Eastern Division** **District Judge Milton I. Shadur**	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: c7_FinalJudgment(form ID: 132)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELIJAH MANUEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 13 C 3022
	)	
CITY OF JOLIET, a municipal corporation, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Elijah Manuel ("Manuel"), who originally launched this action with a self-prepared detailed narrative submitted under the heading "Complaint Under the Civil Rights Act, Title 42 Section 1983 U.S. Code," is now represented by able counsel designated by this Court to serve him pro bono publico. Now the First Amended Complaint ("FAC") recently prepared by counsel on Manuel's behalf has been targeted by two Fed. R. Civ. P. ("Rule") 12(b)(6) motions to dismiss, and late last week Manuel's counsel filed what they label as "Plaintiff's Modified Response in Opposition to Defendants' 12(b)(6) Motion To Dismiss." Because the parties have met head-on in those submissions, the motions are ripe for decision.

Both Rule 12(b)(6) motions focus primarily on a statute-of-limitations bar, pointing (1) to Section 1983's adoption of the two-year statute of limitations for Illinois-based personal injury claims and (2) to the fact that Manuel's original pro se Complaint was brought more than two years after the occurrences that constitute the gravamen of Manuel's Section 1983 claims. Because this Court's earlier oral ruling rejected the other contentions advanced by Manuel's counsel, the most recent submission on Manuel's behalf urges denial of the motions only

"because plaintiff has a non-time-barred Fourth Amendment or Due Process claim" (Response at 2). And when the Response memorandum gets down to the precise issues, it focuses solely on the contention that the "Plaintiff should have an actionable Section 1983 claim for malicious prosecution through the Fourth Amendment" (id. at 4).

On that score Manuel's counsel are totally candid. Their Response at 5 states accurately:

> The Seventh and Eighth Circuits stand alone in deciding that malicious prosecution claims are not actionable as a Fourth Amendment Section 1983 claim. *Newsome v. McCabe*, 256 F. 3d 747, 750 (7th Cir. 2001); *Kurtz v. City of Shrewsbury*, 245 F. 3d 753, 758 (8th Cir. 2001).

As for our Court of Appeals' stance on the subject, the Response goes on to state (also accurately) that the Newsome case "holds that Section 1983 malicious prosecution claims are only cognizable as a substantive due process claim if state law does not provide an adequate remedy" -- and to close the analytical circle, our Court of Appeals has expressly held that Illinois law does provide such a remedy.

What Manuel's counsel must argue then -- and they do with vigor -- is that Newsome should be revisited and "rejected in the present case." That invitation to a District Judge to override the studied adherence by our Court of Appeals to a position that it knows to be a lonely one (see Judge Richard Posner's recent opinion for the panel in Julian v. Hanna, 732 F. 3d 842, 845-46 (7th Cir. 2013)) has put this Court in mind of an even more recent opinion written by Judge Posner that affirmed this Court's decision in a complex case (Inland Mortgage Capital Corp. v. Chivas Retail Partners, No. 12-3648, 2014 WL 310355 (7th Cir. Jan. 29)) and concluded in this fashion (id. at *3):

> What a topsy-turvy world the defense rightly rejected by the district court would create!

This Court likewise rejects the invitation by Manuel's counsel to create still another topsy-turvy world -- if a change from Newsome and its progeny is to be made, it must be left to our Court of Appeals to do so.

Accordingly both Rule 12(b)(6) motions are granted. And (1) because the limitations bar erected by Section 1983 cannot be overcome by a nonviable Illinois-based federal malicious prosecution claim and (2) because the most recent response from Manuel's counsel has not suggested any other tenable basis for the survival of his claims, this action is dismissed as well.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: February 12, 2014

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ELIJAH MANUEL – PETITIONER

VS.

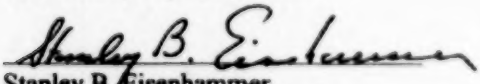
CITY OF JOLIET, ET AL.- RESPONDENT(S)

PROOF OF SERVICE

I, Stanley B. Eisenhammer, an attorney, do swear or declare that on this 23rd day of April 2015, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents properly addressed to each of them by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

John P Wise
City of Joliet Legal Department
150 West Jefferson Street
Joliet, IL 60432

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 23, 2015.



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ORIGINAL

Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

14-9496

vs.

CITY OF JOLIET, a municipal corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Martin J. Shanahan, Jr.
Corporation Counsel
City of Joliet
Attorney for Respondents
150 West Jefferson Street
Joliet, Illinois 60432
(815)724-3800
ARDC No. 06256657

COUNTERSTATEMENT OF QUESTION PRESENTED

Should the 7th Circuit's decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2010) that a Fourth Amendment Section 1983 malicious prosecution is not cognizable be upheld.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

CITY OF JOLIET, ILLINOIS, A MUNICIPAL CORPORATION

OFC. TERRENCE J. GRUBER

OFC. THOMAS CONROY

SGT. SCOTT P CAMMACK

OFC. AARON BANDY

OFC. JEFFREY GERMAN

SGT JOHN STEFANSKI

SGT JOSEPH ROSADO

OFC. JEFFREY KNELLER

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STATEMENT

For the reasons set forth in this Response To Petition For Writ of Certiorari, Respondents respectfully request that the Petition For Writ Of Certiorari be denied in that the Court's decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2010) previously held that a Fourth Amendment Section 1983 malicious prosecution is not cognizable.

ARGUMENT

I. ILLINOIS PROVIDES AN ADEQUATE REMEDY FOR MALICIOUS PROSECUTION

42 U.S.C. §1983 malicious prosecution claims are only cognizable if state law does not provide an adequate remedy *Newsome v. McCabe*, 256 F.3d 747, 750 (7th Cir. 2001).

Manuel claims that he was unreasonably seized and falsely arrested by Joliet police officers on March 18, 2011. (A-23, A-58, A-63-64). Manuel further claims that Defendant police officers prepared false reports and provided perjured testimony that led to false charges being levied against him and continued his detainment. (A 23, A-64). Manuel further argues that Defendant Gruber provided false testimony before the grand jury which also led to Manuel's continued detainment. (A 103, A 116-121). The judge dismissed the charges and entered an order of *nolle prosequi* on May 4, 2011. (A-44, A-65). Manuel has surrendered his various claims with the exception of his insistence that he has a viable claim for malicious prosecution under §1983 through the Fourth Amendment.

Llovet v. City of Chicago, 761 F.3d 759 (7th Cir. 2014) is applicable to this matter and addresses the issues raised by Manuel. In *Llovet*, plaintiff sued two Chicago police officers under 42 U.S.C. §1983 for malicious prosecution after being acquitted of aggravated battery. *Id.* at 760. Llovet claimed that the officers had prepared false police reports and used them to persuade a state prosecutor to file a charge of aggravated battery against him. *Id. Llovet* was dismissed by the District Court on the authority of the decision in *Newsome v. McCabe*, 256 F.3d 747, 750-

751 (7th Cir. 2001), that held a federal suit for malicious prosecution by state officers is permissible only if the state in which the plaintiff had been prosecuted does not provide an adequate remedy, which Illinois does. *Id.* (internal citations omitted). Llovet appealed the dismissal and asked this Court to overrule *Newsome* and hold that 42 U.S.C. §1983 authorizes a federal claim of malicious prosecution regardless of what alternative remedy a state provides. *Id.* The Court rejected Llovet's arguments and affirmed the dismissal.

In upholding the dismissal in *Llovet*, the 7th Circuit once again reaffirmed that the Fourth Amendment does not regulate the length of detentions after a judge has determined that there is probable cause to detain a person on a criminal charge. *Id.* at 762. The 7th Circuit has repeatedly rejected the continuing seizure approach and held that the scope of a Fourth Amendment claim is limited up until the point of arraignment. *Id.*, citing *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004). Once police action gives way to legal process the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process. *Llovet*, at 763. If there is an adequate state remedy for a claim of prolonged detention, such as malicious prosecution and false imprisonment, then the detention cannot be challenged under the Fourth Amendment or as a federal violation of due process. *Id.* at 764.

As was done in the *Llovet* case, this Court must deny the Petition For Writ of Certiorari and reject the arguments to expand the scope of the Fourth Amendment and create a duplicative federal remedy. Manuel's claims are significantly similar to those of Llovet. Manuel also seeks adoption of the continuing seizure approach and

alleges that the arrest was wrongful and resulted in the detention, and that wrongful acts committed after he had been detained were separate violations of the Fourth Amendment. Specifically, Manuel alleges that the false police reports led to the false charges which led to the continued detention. In addition, he alleges that the false grand jury testimony of Gruber was a separate violation of the Fourth Amendment and also contributed to the continued detention. However, as is clear from *Llovet*, when after an arrest or seizure a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.

An unlawfully protracted detention is actionable under Illinois law as malicious prosecution. *Llovet v. City of Chicago*, at 760, 764, citing *Swick v. Liautaud*, 169 Ill.2d 504, 215 Ill.Dec. 98, 662 N.E.2d 1238, 1242 (Ill. 1996). Therefore, since Illinois provides an adequate state remedy, a federal suit for malicious prosecution is not permissible. *Id.* Based on the foregoing, Manuel fails to state a cognizable claim for 42 U.S.C. §1983 malicious prosecution and the Petition For Writ of Certiorari must be denied.

II. ANY 42 U.S.C. §1983 CLAIMS ARE TIME-BARRED UNDER THE TWO-YEAR STATUTE OF LIMITATIONS

The statute of limitations for §1983 claims is the state law period for personal injury torts. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985). Thus, because Illinois law provides a two-year statute of limitations for personal injury actions, 735 ILCS 5/13-202, Plaintiff's §1983 claims must have been brought within two years of those claims' accrual—that is, within two years of the date when the plaintiff knew or

should have known that his constitutional rights were violated. *Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993).

Here, Manuel's complaint alleges that he was arrested and detained on March 18, 2011. He further alleges that he was arraigned on April 8, 2011. Although this is not the time at which he became subject to legal process, it is the only date provided relative to judicial proceedings and it simply reinforces the fact that the complaint was filed outside the time limits even when utilizing the arraignment date. Because Manuel's arrest occurred on March 18, 2011 and he was arraigned on April 8, 2011, but the complaint was not filed until April 10, 2013, any §1983 claims are time-barred.

CONCLUSION

For the foregoing reasons, Defendants City of Joliet, Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado and Kneller respectfully request that this Honorable Court deny the Petition For Writ Of Certiorari.

Respectfully submitted,

By: /s/ Martin J. Shanahan, Jr.
One of Defendants' attorneys

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Corporation Counsel
City of Joliet
150 West Jefferson Street
Joliet, Illinois 60432
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Fax (815) 724-3801
Reg. No. 06256657

In The

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

vs.

CITY OF JOLIET, a municipal corporation, et al.,

Respondents.

PROOF OF SERVICE

TO: Mr Stanley Bert Eisenhammer
Ms. Pamela E. Simaga
Hodges, Loizzi, Eisenhammer
Rodick & Khon LLP
3030 Salt Creek Lane
Suite 202
Arlington Heights, IL 60005

PLEASE TAKE NOTICE that on the 4th day of December, 2015, I have caused to be filed with the Clerk of the United States Supreme Court, our Response To Petition For Writ of Certiorari, a copy of which is attached hereto and served upon you.

Martin Shanahan
Corporation Counsel
City of Joliet
150 West Jefferson Street
Joliet, Illinois 60432
(815) 724-3800
Fax: (815) 724-3801
Reg. No. 06256657

Respectfully submitted,

By: /s/ Martin Shanahan Jr.
One of their attorneys

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Notice of Filing and Response To Petition For Writ of Certiorari were served upon the above named by sending two copies via U.S. mail on the 4th day of December, 2015.

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SUPREME COURT, U.S.

/s/ Martin Shanahan, Jr.

In The

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

vs. No. 14-9496

CITY OF JOLIET, a municipal corporation, et al.,

Respondents.

NOTICE OF FILING

TO: Supreme Court of the United States
Office Of The Clerk
Washington, D.C. 20543-0001

On the 4th day of December, 2015, enclosed please find 40 copies of our Response To Petition For Writ of Certiorari to be filed with the Clerk of the Supreme Court of the United States.

Martin Shanahan
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Reg. No. 06256657

Respectfully submitted,

By: /s/ Martin Shanahan Jr.
One of their attorneys

In The

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Ms. Pamela E. Simaga
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Respectfully submitted,

By: /s/ Martin Shanahan Jr.
One of their attorneys

Martin Shanahan
Corporation Counsel
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Respectfully submitted,

By: /s/ Martin Shanahan Jr.
One of their attorneys

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Supreme Court, U.S.
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NO. 14-9496

In The
Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Stanley B. Eisenhammer
Counsel of Record
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
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Arlington Heights, IL 60005
847-670-9000

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LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

City of Joliet, Illinois, a municipal corporation

Officer Terrence J. Gruber

Officer Thomas Conroy

Sergeant Scott P Cammack

Officer Aaron Bandy

Officer Jeffrey German

Sergeant John Stefanski

Sergeant Joseph Rosado

Officer Jeffery Kneller

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I. PETITIONER'S FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM IS NOT TIME-BARRED

This reply to Respondents' Response to Petition for Writ of Certiorari is filed because the Response misstates the law with respect to the statute of limitation. (Resp'ts' Resp. to Pet. for Writ of Cert. 4–5). Respondents argue that Elijah Manuel's (hereinafter "Manuel" or "Petitioner") Fourth Amendment malicious prosecution claim is barred by the two year statute of limitations because it begins at the time he became subject to legal process (sometime before April 8, 2011), as opposed to when the charges were dropped (May 4, 2011). This issue was not addressed by the Petitioner because not only is Respondents' position contrary to the Supreme Court and the Seventh Circuit precedent, but Respondents also conceded this issue during oral argument before the Seventh Circuit Court of Appeals.

A federal malicious prosecution claim under 28 U.S.C. § 1983 does not accrue until the underlying proceedings terminate in favor of the plaintiff. *Julian v. Hanna*, 732 F.3d 842, 845 (7th Cir. 2013) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994); *see Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action.") (internal quotations omitted); *Johnson v. Saville*, 575 F.3d 656, 659 (7th Cir. 2009) (listing the common law elements of a malicious prosecution claim in Illinois, including that the charges terminate in favor of the plaintiff).[1] Upon questioning at oral arguments, Respondents acknowledged this point. Specifically, Respondents' counsel was asked, "If we did recognize such a claim, at what point would you think the statute of limitations would begin to run? From the point of misrepresentation or from the point the underlying proceedings were terminated in favor of the individual?" Oral Argument at 13:36, Manuel v.

[1] Respondents agree that the appropriate statute of limitation is two years pursuant to Illinois law. 735 ILCS § 5/13-202.

City of Joliet, 590 Fed. Appx. 641 (7th Cir. 2015) (No. 14-1581), *available at* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=14&casenumber 1581&listCase=List+case%28s%29. Respondents conceded:

> If you were to recognize the malicious prosecution under the .... under 1983 and Fourth Amendment, state law malicious prosecution, the accrual is the time at which the proceedings are terminated in favor of that individual. So in this case, the date, I think the date would have been May 4th of 2011...

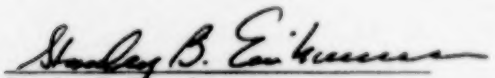
Id. at 14:00.

Manuel filed his claim on April 10, 2013, less than two years after the criminal proceedings terminated on May 4, 2011. As a result, his Fourth Amendment malicious prosecution claim would not be time-barred if it were recognized by this Court.

II. CONCLUSION

Therefore, with this clarification of the law, we respectfully request that this Court grant the petition for a writ of certiorari to resolve a recurring issue of national importance and to settle the long-standing conflict among the circuit courts of appeal as to the availability of a Fourth Amendment malicious prosecution claim.

Respectfully submitted,



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327118_3

No. 14-9496

IN THE
SUPREME COURT OF THE UNITED STATES

ELIJAH MANUEL – PETITIONER

VS.

CITY OF JOLIET, ET AL.- RESPONDENT(S)

PROOF OF SERVICE

I, Stanley B. Eisenhammer, an attorney, do swear or declare that on this 14th day of December 2015, as required by Supreme Court Rule 29, I have served the enclosed PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents properly addressed to each of them by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

Martin J. Shanahan, Jr.
Corporation Counsel
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150 West Jefferson Street
Joliet, IL 60432

I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 14, 2015.

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December 14, 2015

Via Federal Express

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: Supreme Court Docket #14-9496
Elijah Manuel v. City of Joliet, et al.
Reply to Response in Opposition to Petition for Writ of Certiorari

Dear Mr. Harris:

Enclosed for filing are an original and ten copies of Petitioner Elijah Manuel's Reply to the City of Joliet's Response in Opposition to the Petition for a Writ of Certiorari, and accompanying Proof of Service.

Please contact my associate, Mary A. Karagiannis, or me, if you have any questions.

Sincerely,

HODGES, LOIZZI, EISENHAMMER,
RODICK & KOHN LLP

Stanley B. Eisenhammer

SBE/cd

Enclosures

327353_1

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Supreme Court, U.S.
FILED
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No. 14-9496

IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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Counsel for Respondents

PETITION FOR CERTIORARI FILED APRIL 27, 2015
CERTIORARI GRANTED JANUARY 15, 2016

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Additional exhibits submitted with Plaintiff's Modified Response in Opposition to Defendants' 12(b)(6) Motion to Dismiss, filed on February 7, 2014:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Docket for Case No: 1:13-CV-03022

ELIJAH MANUEL,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
4/22/2013	1	RECEIVED Complaint and two copies by Elijah Manuel; (Exhibits). (Envelope not postmarked) (mjc,) (Entered: 04/23/2013)
4/22/2013	2	CIVIL Cover Sheet. (mjc,) (Entered: 04/23/2013)
4/22/2013	3	MOTION by plaintiff Elijah Manuel for leave to proceed in forma pauperis; (Exhibits). (mjc,) (Entered: 04/23/2013)
4/22/2013	4	PETITION by plaintiff Elijah Manuel for writ of habeas corpus. (mjc,) (Entered: 04/23/2013)
4/24/2013	5	ENTER MEMORANDUM Order Signed by the Honorable Milton I. Shadur on 4/24/2013. Mailed notice by judge's staff. (srb,) (Entered: 04/25/2013)

DATE	NO.	PROCEEDINGS
5/7/2013	6	MINUTE entry before Honorable Milton I. Shadur: Pursuant to this Court's memorandum order, entered on 4/24/2013, plaintiff's motion for leave to proceed in forma pauperis 3 is granted. Plaintiff's petition for writ of habeas corpus Mailed notice (mjc,) (Entered: 05/09/2013)
5/22/2013	7	MOTION by plaintiff Elijah Manuel for attorney representation; (Exhibits). (mjc,) (Entered: 05/24/2013)
5/22/2013	8	LETTER from Elijah Manuel dated 5/17/13. (mjc,) (Entered: 05/24/2013)
5/22/2013	9	MOTION by plaintiff Elijah Manuel for leave to proceed in forma pauperis; (Exhibits). (mjc,) (Entered: 05/24/2013)
5/31/2013	10	MEMORANDUM ORDER Signed by the Honorable Milton I. Shadur on 5/31/2013: Mailed notice (tlp,) (Entered: 05/31/2013)
5/31/2013	11	MINUTE entry before Honorable Milton I. Shadur: In that respect this Court's April 24, 2013 memorandum order (issued just two days after Manuel filed this lawsuit) has already granted Manuel's in forma pauperis status under the terms that apply to persons in custody (see 28 U.S.C. §1915). Accordingly that part of Manuel's current request is simply 9 denied as moot. Motion for

DATE	NO.	PROCEEDINGS
		appointment of counsel 7 is granted. Order appointment of Stanley B. Eisenhammer of the firm Hodges, Loizzi, Eisenhammer, Rodick & Kohn, 3030 Salt Creek Lane, Suite 202, Arlington Heights, Il. 6005 to represent the plaintiff in this cause. Attorney Stanley Bert Eisenhammer for Elijah Manuel added. Mailed notice (mjc,) (Entered: 06/03/2013)
6/14/2013	12	ATTORNEY Appearance for Plaintiff Elijah Manuel by John L DiJohn (DiJohn, John) (Entered: 06/14/2013)
6/14/2013	13	ATTORNEY Appearance for Plaintiff Elijah Manuel by Pamela E. Swanson (Swanson, Pamela) (Entered: 06/14/2013)
8/23/2013	14	NOTICE by Elijah Manuel of Change of Address. (mjc,) (Entered: 08/28/2013)
9/20/2013	15	*First* AMENDED complaint by Elijah Manuel against Elijah Manuel (Eisenhammer, Stanley) (Entered: 09/20/2013)
9/20/2013	16	NOTICE by Elijah Manuel re amended complaint 15 (Eisenhammer, Stanley) (Entered: 09/20/2013)
9/23/2013	17	MINUTE entry before Honorable Milton I. Shadur: Initial status hearing set for 10/2/2013 at 9:15 A.M. in courtroom 2303. Mailed notice by judge's staff. (srb,) (Entered: 09/23/2013)

DATE	NO.	PROCEEDINGS
10/2/2013	18	MINUTE entry before Honorable Milton I. Shadur: Status hearing held on 10/2/2013 and continued to 1/13/2014 at 9:00 a.m. Mailed notice by judge's staff. (srb,) (Entered: 10/02/2013)
10/7/2013	19	ATTORNEY Appearance for Defendants Unknown Officers of the Will County Sheriff's Office, Will County by Julie M Koerner (Koerner, Julie) (Entered: 10/07/2013)
10/7/2013	20	ATTORNEY Appearance for Defendants Unknown Officers of the Will County Sheriff's Office, Will County by Bhairav Radia (Radia, Bhairav) (Entered: 10/07/2013)
10/9/2013	21	NOTICE by Pamela E. Swanson of Change of Address *Attorney Name only* (Swanson, Pamela) (Entered: 10/09/2013)
10/9/2013	22	WAIVER OF SERVICE returned executed by Elijah Manuel. Will County waiver sent on 10/1/2013, answer due 12/2/2013. (Swanson, Pamela) (Entered: 10/09/2013)
10/9/2013	23	WAIVER OF SERVICE returned executed by Elijah Manuel. Unknown Officers of the Will County Sheriff's Office waiver sent on 10/1/2013, answer due 12/2/2013. (Swanson, Pamela) (Entered: 10/09/2013)

DATE	NO.	PROCEEDINGS
10/22/2013	24	ATTORNEY Appearance for Defendants Aaron Bandy, Scott P. Cammack, City of Joliet, Thomas Conroy, Jeffrey German, Terrence J. Gruber, Jeffrey Kneller, Joseph Rosado, John Stefanski by John Patrick Wise (Wise, John) (Entered: 10/22/2013)
10/22/2013	25	ATTORNEY Appearance for Defendants Aaron Bandy, Scott P Cammack, City of Joliet, Thomas Conroy, Jeffrey German, Terrence J. Gruber, Jeffrey Kneller, Joseph Rosado, John Stefanski by Gregory Smith (Smith, Gregory) (Entered: 10/22/2013)
10/22/2013	26	ATTORNEY Appearance for Defendants Aaron Bandy, Scott P. Cammack, City of Joliet, Thomas Conroy, Jeffrey German, Terrence J. Gruber, Jeffrey Kneller, Joseph Rosado, John Stefanski by Jeffrey Scott Plyman (Plyman, Jeffrey) (Entered: 10/22/2013)
10/22/2013	27	ATTORNEY Appearance for Defendants Aaron Bandy, Scott P Cammack, City of Joliet, Thomas Conroy, Jeffrey German, Terrence J. Gruber, Jeffrey Kneller, Joseph Rosado, John Stefanski by Mary Josephine Kucharz (Kucharz, Mary) (Entered: 10/22/2013)
12/2/2013	28	MOTION by Defendants Unknown Officers of the Will County Sheriff's Office, Will County for extension of

DATE	NO.	PROCEEDINGS
		time to file answer regarding amended complaint 15 *or Otherwise Plead* (Koerner, Julie) (Entered: 12/02/2013)
12/2/2013	29	NOTICE of Motion by Julie M Koerner for presentment of motion for extension of time to file answer, motion for relief 28 before Honorable Milton I. Shadur on 12/10/2013 at 09:15 AM. (Koerner, Julie) (Entered: 12/02/2013)
12/4/2013	30	MOTION by Defendants Jeffrey Kneller, City of Joliet, Terrence J. Gruber, Joseph Rosado, John Stefanski, Aaron Bandy, Jeffrey German, Thomas Conroy, Scott P. Cammack to dismiss *First Amended Complaint* (Attachments: # 1 Memorandum) (Wise, John) (Entered: 12/04/2013)
12/4/2013	31	NOTICE of Motion by John Patrick Wise for presentment of motion to dismiss, 30 before Honorable Milton I. Shadur on 12/10/2013 at 09:15 AM. (Wise, John) (Entered: 12/04/2013)
12/9/2013	32	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (Koerner, Julie) (Entered: 12/09/2013)
12/9/2013	33	MEMORANDUM by Unknown Officers of the Will County Sheriff's Office, Will County in support of Motion to Dismiss for Failure to State a Claim (Koerner, Julie) (Entered: 12/09/2013)

DATE	NO.	PROCEEDINGS
12/9/2013	34	NOTICE of Motion by Julie M Koerner for presentment of Motion to Dismiss for Failure to State a Claim 32 before Honorable Milton I. Shadur on 12/19/2013 at 09:15 AM. (Koerner, Julie) (Entered: 12/09/2013)
12/10/2013	35	MINUTE entry before the Honorable Milton I. Shadur: Motion hearing held on 12/10/2013. Defendants Will County, Illinois and Unknown Officers of the Will County Sheriff's Office's motion for extension of time to answer or otherwise plead 28 to plaintiff's first amended complaint is granted to and including 12/9/2013. Defendants' motions to dismiss 30, 32 are entered and continued. Plaintiff is ordered to file a response to the motions to dismiss on or before 1/9/2014. No appearance necessary on 12/19/2013. Status hearing set for 1/13/2014 at 9:00 a.m. to stand. Mailed notice by judge's staff. (srb,) (Entered: 12/10/2013)
1/3/2014	36	ATTORNEY Appearance for Defendants Unknown Officers of the Will County Sheriff's Office, Will County by Katharine P.a. Smeenk (Smeenk, Katharine) (Entered: 01/03/2014)
1/8/2014	37	RESPONSE by Elijah Manuel in Opposition to MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM 32, MOTION by Defendants Jeffrey Kneller, City of Joliet, Terrence J.

DATE	NO.	PROCEEDINGS
		Gruber, Joseph Rosado, John Stefanski, Aaron Bandy, Jeffrey German, Thomas Conroy, Scott P. Cammack to dismiss *First Amended Complaint* 30 (Eisenhammer, Stanley) (Entered: 01/08/2014)
1/8/2014	38	NOTICE by Elijah Manuel re response in opposition to motion, 37 *Notice of Filing* (Eisenhammer, Stanley) (Entered: 01/08/2014)
1/13/2014	39	MINUTE entry before the Honorable Milton I. Shadur: Status hearing held on 1/13/2014. Will County defendants' Rule 12(b)(6) motion to be dismissed 32 from plaintiff's first amended complaint is granted for the reasons stated in open court. City of Joliet and other named defendants' motion to be dismissed from the first amended complaint 30 is continued to 1/16/2014 at 9:30 a.m. Mailed notice by judge's staff. (srb,) (Entered: 01/14/2014)
1/16/2014	40	MINUTE entry before the Honorable Milton I. Shadur: Motion hearing held on 1/16/2014. Motion by defendants Kneller, City of Joliet, Gruber, Rosado, Stefanski, Bandy, German, Conroy, and Cammack to dismiss First Amended Complaint 30 is continued. Plaintiff is ordered to file a more properly focused response to the motion on or before 2/7/2014. Status hearing set for 2/13/2014 at 8:45 a.m.

DATE	NO.	PROCEEDINGS
		Mailed notice by judge's staff. (srb,) (Entered: 01/16/2014)
2/7/2014	41	RESPONSE by Elijah Manuel in Opposition to MOTION by Defendants Jeffrey Kneller, City of Joliet, Terrence J. Gruber, Joseph Rosado, John Stefanski, Aaron Bandy, Jeffrey German, Thomas Conroy, Scott P. Cammack to dismiss *First Amended Complaint* 30 *Modified Response* (Attachments: # 1 Exhibit Exhibits) (Eisenhammer, Stanley) (Entered: 02/07/2014)
2/7/2014	42	NOTICE by Elijah Manuel re response in opposition to motion, 41 *Notice of Filing* (Eisenhammer, Stanley) (Entered: 02/07/2014)
2/12/2014	43	MINUTE entry before the Honorable Milton I. Shadur: Enter Memorandum Order. Accordingly both Rule 12(b)(6) motions to dismiss 30 are granted. And (1) because the limitations bar erected by Section 1983 cannot be overcome by a nonviable Illinois-based federal malicious prosecution claim and (2) because the most recent response from Manuel's counsel has not suggested any other tenable basis for the survival of his claims, this action is dismissed as well. Civil case terminated. Mailed notice by judge's staff. (srb,) (Entered: 02/12/2014)

DATE	NO.	PROCEEDINGS
2/12/2014	44	MEMORANDUM Order Signed by the Honorable Milton I. Shadur on 2/12/2014. Mailed notice by judge's staff. (srb,) (Entered: 02/12/2014)
3/14/2014	45	MOTION by Plaintiff Elijah Manuel for leave to appeal in forma pauperis (Attachments: # 1 Affidavit Exhibit A- Affidavit)(Eisenhammer, Stanley) (Entered: 03/14/2014)
3/14/2014	46	NOTICE of Motion by Stanley Bert Eisenhammer for presentment of motion for leave to appeal in forma pauperis 45 before Honorable Milton I. Shadur on 3/18/2014 at 09:15 AM. (Eisenhammer, Stanley) (Entered: 03/14/2014)
3/14/2014	47	NOTICE of appeal by Elijah Manuel regarding orders 44, 43 (Eisenhammer, Stanley) (Entered: 03/14/2014)
3/14/2014	48	DOCKETING Statement by Elijah Manuel regarding notice of appeal 47 (Eisenhammer, Stanley) (Entered: 03/14/2014)
3/17/2014	53	MOTION by Plaintiff Elijah Manuel for leave to appeal in forma pauperis. (Exhibits) (ea,) (Entered: 03/19/2014)
3/18/2014	49	MINUTE entry before the Honorable Milton I. Shadur: Motion hearing held on 3/18/2014. Enter Memorandum Order. Plaintiff's motion for leave to appeal in forma pauperis 45 is referred to the Court of Appeals with a request

DATE	NO.	PROCEEDINGS
		for its decision. Mailed notice by judge's staff. (srb,) (Entered: 03/18/2014)
3/18/2014	50	MEMORANDUM Order Signed by the Honorable Milton I. Shadur on 3/18/2014. Mailed notice by judge's staff. (srb,) (Entered: 03/18/2014)
3/19/2014	51	NOTICE of Appeal Due letter sent to counsel of record regarding notice of appeal 47. (smm) (Entered: 03/19/2014)
3/19/2014	52	TRANSMITTED to the 7th Circuit the short record on notice of appeal 47. Notified counsel (smm) (Entered: 03/19/2014)
3/19/2014	54	ACKNOWLEDGMENT of receipt of short record on notice of appeal 47; USCA Case No. 14-1581. (ea,) (Entered: 03/19/2014)
3/19/2014	55	CIRCUIT Rule 3(b) Notice. (ea,) (Entered: 03/19/2014)
3/20/2014	56	ORDER dated 3/20/2014 from the Seventh Circuit regarding notice of appeal 47; Appellate case no. : 14-1581. The appellant filed a motion for leave to appeal in forma pauperis with the district court, and that court referred the matter to this court for decision. Federal Rule of Appellate Procedure 24(a)(1) requires a party who desires to appeal in forma pauperis to first file a motion in the district court. If the district court grants the motion, then the party may proceed on appeal

DATE	NO.	PROCEEDINGS
		in forma pauperis. Fed. R. App. P. 24(a)(2). If it denies the motion, the district court must state its reasons in writing and the party may renew the motion with this court. Fed. R. App. P. 24(a)(2); 24(a)(5). Because Federal Rule of Appellate Procedure 24 requires the district court to consider the motion in the first instance, it is requested that the district court consider the in forma pauperis motion filed before it on the merits. (ea,) (Entered: 03/21/2014)
3/20/2014	58	MOTION by Plaintiff Elijah Manuel for leave to appeal in forma pauperis. (Exhibits)(ea,) (Entered: 03/25/2014)
3/21/2014	57	MEMORANDUM by Elijah Manuel in support of motion for leave to appeal in forma pauperis 45 (Eisenhammer, Stanley) (Entered: 03/21/2014)
3/26/2014	59	ENTER MEMORANDUM Order Signed by the Honorable Milton I. Shadur on 3/26/2014. Mailed notice by judge's staff. (srb,) (Entered: 03/26/2014)
3/31/2014	60	MEMORANDUM ORDER, Signed by the Honorable Milton I. Shadur on 3/31/2014. (ea,) (Entered: 04/01/2014)
4/4/2014	61	TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 47 (USCA no. 14-01581). (et,) (Entered: 04/04/2014)

DATE	NO.	PROCEEDINGS
4/15/2014	62	SEVENTH CIRCUIT transcript information sheet by Elijah Manuel (Eisenhammer, Stanley) (Entered: 04/15/2014)
4/30/2014	63	MINUTE entry before the Honorable Milton I. Shadur: Pursuant to the orders of March 26 and 31, 2014, plaintiff's motions for leave to appeal in forma pauperis 45, 53 and 58 are granted. Mailed notice by judge's staff. (srb,) (Entered: 04/30/2014)
5/12/2014	64	ORDER: Pursuant to the memorandum order of March 31, 2014, the Big Muddy trust fund officer is ordered to collect that amount from Manuel's trust fund account there and to pay it directly to the Clerk of Court ("Clerk"): Office of the Clerk, United States District Court, 219 South Dearborn Street, Chicago, IL 60604, Attention: Fiscal Department. After such payment, the trust fundofficer at Big Muddy (or at any other correctional facility where Manuel may hereafter be confined) is authorized to collect monthly payments from his trust fund account in an amount equal to 20% of the preceding month's income credited to the account. Monthly payments collected from the trust fund account shall be forwarded to the Clerk each time the amount in the account exceeds $10 until the full $350 filing fee is paid.

DATE	NO.	PROCEEDINGS
		Both the initial payment and all future payments shall clearly identify Manuel's name and the 13 C 3022 case number assigned to this action. The Clerk shall send a copy of the memorandum order 60 to the Big Muddy trust fund officer. Signed by the Honorable Milton I. Shadur on 5/12/2014. Mailed notice(mjc,)
5/13/2014		MAILED a copy of the memorandum (Entered: 05/13/2014)
5/30/2014	67	MOTION by Plaintiff Elijah Manuel to clarify */correct March 31, 2014, Memo Order to Reflect Proper Total Appellate Court Docketing Fee* (Simaga, Pamela) (Entered: 05/30/2014)
5/30/2014	68	NOTICE of Motion by Pamela E. Simaga for presentment of motion to clarify 67 before Honorable Milton I. Shadur on 6/9/2014 at 09:15 AM. (Simaga, Pamela) (Entered: 05/30/2014)
6/9/2014	69	MINUTE entry before the Honorable Milton I. Shadur: Motion hearing held on 6/9/14. MOTION by Plaintiff Elijah Manuel to clarify /correct March 31, 2014, Memo Order 60 to Reflect Proper Total Appellate Court Docketing Fee 67 is granted. The record is modified to show the proper total amount for the Appellate Court filing and docketing fee is $505. Mailed notice (tlp,) (Entered: 06/09/2014)

DATE	NO.	PROCEEDINGS
12/15/2014	76	NOTICE of Correction regarding 73 (ea,) (Entered: 12/15/2014)
2/19/2015	79	LETTER from the Seventh Circuit regarding the record on appeal in USCA no. 14-1581; no record to return. (ks,) (Entered: 02/20/2015)
2/19/2015	80	MANDATE of USCA dated 1/28/2015 regarding notice of appeal 47; USCA No. 14-1581. The Judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date. (ks,) (Entered: 02/20/2015)
2/19/2015	81	OPINION from the USCA for the Seventh Circuit; Argued 12/16/2014; Decided 1/28/2015 in USCA case no. 14-1581. (ks,) (Entered: 02/20/2015)
12/1/2015	88	MOTION by Defendants Aaron Bandy, Scott P. Cammack, City of Joliet, Thomas Conroy, Jeffrey German, Terrence J. Gruber, Jeffrey Kneller, Joseph Rosado, John Stefanski to withdraw (Wise, John) (Entered: 12/01/2015)
12/1/2015	89	NOTICE of Motion by John Patrick Wise for presentment of motion to withdraw 88 before Honorable Milton I. Shadur on 12/8/2015 at 09:15 AM. (Wise, John) (Entered: 12/01/2015)
12/8/2015	90	MINUTE entry before the Honorable Milton I. Shadur: Motion hearing held. Motion of John Patrick Wise to

DATE	NO.	PROCEEDINGS
		withdraw as one of the attorneys for the City of Joliet and the individual Joliet Defendants 88 is granted. Mailed notice (clw,) (Entered: 12/08/2015)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Civil Docket For Case No: 14-01581

ELIJAH MANUEL,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
3/19/2014	1	State prisoner's civil rights case docketed. IT IS ORDERED that this appeal is subject to the Prison Litigation Reform Act. Proceedings are SUSPENDED pending notification by the district court that any necessary fee has been assessed, and if assessed, paid. PLRA IFP pending in the Appellate Court. Docketing statement filed. Transcript information sheet due by 04/02/2014. [1] [6560851] [14-1581] (AD)
3/19/2014		THIS CAUSE CONSISTS OF MORE THAN 5 PARTIES FOR EITHER SIDE. The following are those parties to this cause as reflected on the District Court docket, yet are not reflected on the Appellate docket/caption for administrative purposes: APPELLEES:

DATE	NO.	DOCKET TEXT
		Aaron Bandy, Jeffrey German, John Stefanski and Jeffrey Kneller. [6560855-2] [6560855] [14-1581] (AD)
3/19/2014	2	Motion filed by Appellant Elijah Manuel to proceed on appeal in forma pauperis. [2] [6560857] [14-1581] (AD)
3/20/2014	3	ORDER: The appellant filed a motion for leave to appeal in forma pauperis with the district court, and that court referred the matter to this court for decision. Federal Rule of Appellate Procedure 24(a)(1) requires a party who desires to appeal in forma pauperis to first file a motion in the district court. If the district court grants the motion, then the party may proceed on appeal in forma pauperis. Fed. R. App. P. 24(a)(2). If it denies the motion, the district court must state its reasons in writing and the party may renew the motion with this court. Fed. R. App. P. 24(a)(2); 24(a)(5). Because Federal Rule of Appellate Procedure 24 requires the district court to consider the motion in the first instance, it is requested that the district court consider the in forma pauperis motion filed before it on the merits. [3] [6561214] JKL [14-1581] (ER)
4/1/2014	4	Filed District Court order GRANTING Appellant Elijah Manuel leave to proceed on appeal in forma pauperis. Date IFP granted: 03/31/2014. District

DATE	NO.	DOCKET TEXT
		Court has assessed a $14.95 initial partial filing fee. [4] [6563798] PLRA initial partial filing fee due by 05/01/2014. [14-1581] (DS)
4/8/2014	5	Original record on appeal filed electronically. Contents of record: 1 vol. of pleadings. [5] [6565564] [14-1581] (SP)
4/15/2014	6	Filed Seventh Circuit Transcript Information Sheet by Appellant Elijah Manuel. [6] [6568102] [14-1581] (Eisenhammer, Stanley)
4/15/2014	7	Disclosure Statement filed by Attorney Eisenhammer, Stanley B. for Appellant Elijah Manuel. [7] [6568123] (L-Yes; E-Yes; R-No) [14-1581] (Eisenhammer, Stanley)
4/30/2014	8	Motion filed by Appellant Elijah Manuel to extend time to file payment of filing fee. [8] [6572218] [14-1581] (Eisenhammer, Stanley)
5/1/2014	9	ORDER issued GRANTING motion to extension of time to pay filing fee. [8] The appellant shall pay the required initial partial filing fee of $14.95 by May 15, 2014. [9] [6572331] JKL [14-1581] (AD)
5/27/2014	10	***PRISON LITIGATION REFORM ACT PARTIAL FILING FEE. Received: $14.95 from Appellant Elijah Manuel on 05/14/2014. [10] [6578499] [14-1581] (EF)

DATE	NO.	DOCKET TEXT
5/27/2014	11	***PRISON LITIGATION REFORM ACT PARTIALFILING FEE. Received: $.06 from Appellant Elijah Manuel on 05/16/2014. [11] [6578501] [14-1581] (EF)
5/28/2014	12	ORDER: The District Court GRANTED the appellant leave to proceed on appeal in forma pauperis and has now received the initial partial filing fee. Briefing will proceed as follows: Appellant's brief due on or before 06/27/2014 for Elijah Manuel. Appellee's brief due on or before 07/28/2014 for Scott P Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. Appellant's reply brief, if any, is due on or before 08/11/2014 for Appellant Elijah Manuel. [12] [6578616] [14-1581] (JK)
6/23/2014	13	Motion filed by Appellant Elijah Manuel to correct briefing order to list all appellees. [13] [6585032] [14-1581] (Eisenhammer, Stanley)
6/25/2014	14	ORDER re: Motion to correct May 28, 2014, briefing order to list all appellees, filed on 6/23/14. A review of the court's docket indicates that Aaron Bandy, Jeffrey German, John Stefanski and Jeffrey Kneller are appellees in this appeal but are not listed on the court's docket for administrative purposes. This court's briefing order dated May 28, 2014, applies to all the

DATE	NO.	DOCKET TEXT
		appellees. [13] CMD [14] [6585498] [14 1581] (FP)
6/27/2014	15	Submitted appellant brief by Stanley B. Eisenhammer for Appellant Elijah Manuel. [15] [6586294] [14-1581] (Eisenhammer, Stanley)
6/27/2014	16	Appellant's brief filed by Appellant Elijah Manuel. Paper copies due on 07/07/2014 Electronically Transmitted. [16] [6586424] [14-1581] (RS)
6/27/2014	17	Filed Appendix by Appellant Elijah Manuel. [17] [6586427] Paper copies due on 07/07/2014 [14-1581] (RS)
7/28/2014	18	Motion filed by Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado to extend time to file appellee brief. [18] [6593355] [14-1581] (Wise, John)
7/28/2014	19	Order issued GRANTING motion to extend time to file appellees' brief [18] Appellee's brief due on or before 08/18/2014 for Scott P Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. Appellant's reply brief, if any, is due on or before 09/02/2014 for Appellant Elijah Manuel. Counsel for the appellees is reminded that motions for extension of time should comply with the requirements of Circuit Rule 26. CMD [19] [6593447] [14-1581] (ER)

DATE	NO.	DOCKET TEXT
8/18/2014	20	Submitted appellee brief by John P. Wise for Appellees Scott P Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. [20] [6598538] [14-1581] (Wise, John)
8/18/2014	21	Filed Notice of Filing Brief of the Defendants-Appellees by Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. [21] [6598539] [14-1581] (Wise, John)
8/18/2014	22	Brief deficiency letter sent to Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. [22] [6598608] [14-1581] (RS)
8/18/2014	23	Filed Notice of Filing by Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. notice of intent to file Brief of the Defendants-Appellees. [23] [6598672] [14-1581]--[Edited 08/18/2014 by AD to reflect correct document filed.] (Wise, John)
8/18/2014	24	Re-Submitted appellee brief by John P. Wise for Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. [24] [6598675] [14-1581] (Wise, John)
8/18/2014	25	Appellee's brief filed by Appellees Scott P Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph

DATE	NO.	DOCKET TEXT
		Rosado. Paper copies due on 08/25/2014 Electronically Transmitted. [25] [6598721] [14-1581] (RS)
9/2/2014	26	Submitted appellant reply brief by Stanley B. Eisenhammer for Appellant Elijah Manuel. [26] [6602350] [14-1581] (Eisenhammer, Stanley)
9/2/2014	27	Appellant's reply brief filed by Appellant Elijah Manuel. Paper copies due on 09/10/2014 Electronically Transmitted. [27] [6602761] [14-1581] (SP)
10/31/2014	28	Argument set for Tuesday, December 16,2014, at 10:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [28] [6617479] [14-1581] (SK)
12/8/2014	29	Received argument confirmation from Stanley B. Eisenhammer for Appellant Elijah Manuel. [29] [6626310] [14-1581] (Eisenhammer, Stanley)
12/8/2014	30	Received argument confirmation from John P. Wise for Appellees Scott P. Cammack, City of Joliet, Thomas Conroy, Terrence J. Gruber and Joseph Rosado. [30] [6626345] [14-1581] (Wise, John)
12/16/2014	31	Case heard and taken under advisement by panel: Diane P. Wood, Chief Judge; Ilana Diamond Rovner, Circuit Judge and John Daniel Tinder, Circuit Judge. [31] [6628307] [14-1581] (ACB)

DATE	NO.	DOCKET TEXT
12/16/2014	32	Case argued by Mr. Stanley B. Eisenhammer for Appellant Elijah Manuel and Mr. John P. Wise for Appellees City of Joliet, Terrence J. Gruber, Thomas Conroy, Scott P. Cammack and Joseph Rosado. [32] [6628319] [14-1581] (ACB)
1/28/2015	33	Filed Nonprecedential, Disposition PER CURIAM. AFFIRMED. Diane P. Wood, Chief Judge; Ilana Diamond Rovner, Circuit Judge and John Daniel Tinder, Circuit Judge. [33] [6637543] [14-1581] (CAG)
1/28/2015	34	ORDER: Final judgment filed per nonprecedential disposition. With costs: yes. [34] [6637546] [14-1581] (CAG)
2/19/2015	35	Mandate issued. No record to be returned. [35] [6642211] [14-1581]--[Edited 02/19/2015 by ACB] (ACB)
4/27/2015	36	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 14-9496 [36] [6659001] [14-1581]--[Text updated 06/15/2015 by JR to reflect correct S.C. number.] (FP)
1/19/2016	37	Filed order from the Supreme Court GRANTING the petitioner's motion for leave to proceed in forma pauperis and Petition for Writ of Certiorari. 14-9496. [37] [6721956] [14-1581] (ER)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed: 04/22/13]

Case No. 13 C 3022

ELIJAH MANUEL

Plaintiff,

v.

CITY OF JOLIET, & ITS: JOLIET POLICE DEPARTMENT
TERRENCE J. GRUBER #261, THOMAS CONROY #271,
SCOTT P. CAMMACK #285, K. STEELE #812,
OFC. #252, OFC. #234, SGT. STEFANSKI #82,
SUPV. #64 J., KNELLER #200,

Defendants'.

Judge Milton I. Shadur
Magistrate Judge Young B. Kim

COMPLAINT UNDER THE CIVIL RIGHTS ACT,
TITLE 42 SECTION 1983 U.S.CODE

I. Plaintiff:

A. Name: Elijah Manuel

B. List all aliases:

C. Prisoner ID Number: 2012-0000555

D. Place of present confinement: Will County Adult Detention Facility

E. Address: 95 S. Chicago St. Joliet, Illinois 60436

II. Defendants:

A. City of Joliet & its: Joliet Police Department

B. Defendant: Terrence J. Gruber
Title: Joliet Police Officer Badge #261 Place of employment: Joliet Police Department

C. Defendant: Thomas Conroy
Title: Joliet Police Officer Badge #271 Place of employment: Joliet Police Department

D. Defendant: Scott P Cammack
Title: Evidence Technician Officer Badge #285
Place of employment: Joliet Police Department

E. Defendant: K. Steele
Title: Joliet Police Officer Badge #812
Place of employment: Joliet Police Department

F. Defendant: Officer
Title: Joliet Police Officer Badge #252
Place of employment: Joliet Police Department

G. Defendant: Officer
Title: Joliet Police Officer Badge #234
Place of employment: Joliet Police Department

H. Defendant: SGT. Stefanski
Title: Sergeant At Scene Officer Badge #82
Place of employment: Joliet Police Department

I. Defendant: Officer
Title: Field Supervisor Officer Badge #64
Place of employment: Joliet Police Department

J. Defendant: J. KNELLER
Title: Joliet Police Officer Badge #200
Place of employment: Joliet Police Department

III. Previous Litigation:

A. Name of case and docket number: _____
_____

B. Approximate date of filing lawsuit: _____

C. List all plaintiffs (if you had co-plaintiffs), including any aliases: _____
_____
_____
_____

D. List all defendants: _____
_____
_____
_____

E. Court in which the lawsuit was filed (if federal court, name the district; if state court, name the county): _____

F. Name of judge to whom case was assigned:
_____

G. Basic claim made: _____
_____
_____

H. Disposition of this case (for example: Was the case dismissed? Was it appealed? Is it still pending?): _____
_____
_____

I. Approximate date of disposition: _____

IV. Statement of Claims:

1.) ILLEGAL SEARCH AND SEIZURE

On March 18th 2011 at 1:20 AM, the plaintiff was involved in a traffic stop by the Joliet Police Department, in the County of Will. The Plaintiff was a passenger of the vehicle. When the stop occurred the driver was licensed and the vehicle was insured. Plaintiff has a copy of proof of insurance and will be use as Exhibit "A" to this complaint and incorporated by reference in it. Plaintiff had proof at the time of the stop, proper documents that the 2005 Pontiac Grand Prix was recently traded in and that the license plate was transferred over to the Dodge Charger. Plaintiff has a copy of the proper documents and will be used as Exhibit "B" to this complaint and incorporated by reference in it. The Joliet Police officers ignored these facts and proceeded to do as they will. The defendants had no legal basis for stopping plaintiff. Defendants falsely accused plaintiff of moving around in the car very quickly and that they could smell the sent of burnt cannabis emitting from the vehicle. This accusation constituted a pretext for a search and seizure of the plaintiff. The true purpose of stopping the plaintiff was to search and harass the plaintiff. Upon the illegal search followed by the malicious arrest, the defendants did conduct a pat down and went into the plaintiff's pants pocket and took from plaintiff his vitamin and mineral bottle, which contained pink vitamins and minerals inside the bottle. The defendants did a field test on the vitamin and mineral pills in fact to see if the pills contained any illegal drugs. Field test results came back as negative. Defendants ignored these facts and proceeded to say the pills were ecstasy pills, which in fact they were not, although plaintiff protested his

innocence. Plaintiff was still transported to the Joliet Police Department. Plaintiff's car was towed because the defendants made false testimony stating, "Plaintiff had 16 pink pills that tested positive as ecstasy." Plaintiff has a copy of tow sheet and why the car was towed. This will be use as Exhibit "C" in this complaint and incorporated by reference in it. The search of the person, vehicle, effects of the plaintiff in public, caused serious emotional injury to the plaintiff. All of these searches were conducted without probable cause or a warrant. There were no reasonable basis existed for the actions taken against the plaintiff. No exigent circumstances existed to justify the failure to obtain warrants prior to conducting the searches. The search and seizure of the plaintiff were unreasonable, intrusive, and intended to harass and harm the plaintiff. The arrest was not justified by probable cause or other legal privilege. All of the defendants acted wantonly, recklessly, willfully, and maliciously with the intent of injuring and oppressing the plaintiff. All the defendants are liable to the plaintiff under Illinois state law for false arrest, imprisonment and illegal search and seizure. At all times mentioned in this complaint, the defendants were acting under color of law, that is under color of the Constitution, statutes, laws, rules, regulations, customs, and usage of the State of Illinois. The defendants and each of them, separately and in concert with each other, engaged in acts and omissions that constituted deprivations of the rights, privileges, immunities of the plaintiff. While these acts were carried out under color of law, they had no justification or excuse in law. There actions were gratuitous, illegal, improper, and unrelated to any activity in which law enforcement officers may appropriately and legally engage in the course of

protecting persons and property of ensuring civil order.

2.) Wrongful And Malicious Arrest

The defendants Terrence Gruber #261 and Thomas Conroy #271 were employed as law enforcement officers at the Joliet Police Department in the County of Will acting within the scope of their employment, with the permission and consent of the City of Joliet. On 3-18-11 a pretext traffic stop had occurred in a Dodge Charger that had 20% tint on the windows, which at 1:20 AM made it impossible to see into the vehicle around that time and stop, near Miles and Elmwood Ave. The plaintiff was awoke by these defendants who opened plaintiff's door and forcibly removed the plaintiff from the vehicle for no apparent reason. The plaintiff tripped over a curve and fell on the ground by Terrance Gruber #261 aggressive tactics. The plaintiff was in the vehicle asleep. Terrance Gruber #261 and Thomas Conroy #271 who assisted wrote false police reports and used perjury testimony to justify there probable cause to search and arrest the plaintiff by stating, "they smelled the scent of burnt cannabis emitting from inside of the vehicle," which was false testimony. The plaintiff never got a chance to roll down the window for which the officers can make that determination. Instead they opened the door and snatched the plaintiff immediately out of the car without probable cause. Also the defendants made false testimony by stating, that, "the plaintiff tried to run away from the officers." That was said, so they can justify there malicious arrest. These officers did then, without a warrant, judicial order, or other authority of law, wrongfully, unlawfully, and without probable cause, arrested plaintiff and compel the plaintiff against his will, to go with them to the Police Precinct

at 150 W. Washington St. Joliet, IL 60436, where the plaintiff was wrongfully and unlawfully detained. The plaintiff was later released on 5-5-11 without any explanation and all charges were dropped by Court Order. Plaintiff has a copy of the Court Order and will be used as Exhibit "D" to this complaint and incorporated by reference in it. At the time of arrest, plaintiff did not commit any offenses for which he could be arrested for. As a result of these acts, plaintiff was deprived of his liberty and has suffered great mental anguish and humiliation, and suffered injuries to his body, good name, and reputation.

3.) Excessive Use Of Force And Malicious Injury

On 3-18-11, at 1:20 AM, plaintiff was a passenger in a automobile that had been stopped. The plaintiff was accompanied by Jeffery I. Faint who was the driver. Plaintiff was awoke by Terrence Gruber #261 who opened plaintiff's door and forcibly and physically removed plaintiff from the vehicle without probable cause. By Terrence Gruber #261 aggressive tactics it had cause the plaintiff to lose his balance and trip over a curve. At that time Terrence Gruber #261 had grabbed, tugged, and pulled the plaintiff down. In addition, he grabbed the plaintiff around the arms and torso and thrusted the plaintiff face down toward the ground. The plaintiff braced his fall with his hands and pushed himself upon his hands and knees. Terrence Gruber #261 then came down by kneeing the plaintiff in his back. Terrence Gruber #261 who out weighed the plaintiff at least 150 pounds. Defendant maintained staying on the plaintiff's back. Plaintiff had landed on the brick sidewalk surface, striking his head and chest against the bricks, immediately causing injury to the plaintiff's body. Defendants handcuffed the plaintiff. Thomas Conroy #271 who

came and assisted Terrence Gruber #261 yelled, "Quit resisting! The plaintiff responded, "I'm not resisting! I'm not resisting!" Thomas Conroy #271 and Tarrance Gruber #261 both began punching and kicking the plaintiff on the ground while handcuffed, making obscene, and derogatory remarks stating, "You remember me street punk, Now I got you, You Fucking Nigger!" Defendants had no legal basis for using excessive force upon the plaintiff. Plaintiff in no way instigated, caused, or contributed to the cqmplained of conduct. Defendants falsely accused plaintiff of trying to run away from them. This accusation constituted a pretext for an arrest. 3 to 5 additional Joliet Police Officers just stood by and did nothing. All the defendants acted wantonly, recklessly, willfully, and maliciously, with the intent of injuring and oppressing the plaintiff. As a result of the acts of the defendants the plaintiff suffered injuries, including an abrasion on the face, black eye, pain in the head and chest. As a further result of the acts of the defendants the plaintiff also suffered injuries, including soreness and numbness of the right wrist and hand, which continued for approximately 4 in a half weeks following the incident. In addition, the plaintiff suffered regular shooting pains from the right elbow to the thumb for approximately 4 in a half weeks following the incident. The frequency of these pains subsided after 4 in a half weeks to about 2 weeks. But, continued intermittently for roughly 4 more weeks. The plaintiff also suffered numbness of the right thumb and index finger for about approximately 5 months following the date of the incident. At the time and place noted in this complaint, plaintiff was assaulted and battered by the defendants. The use of excessive force while plaintiff was in handcuffs was unnecessary and not reasonable.

4.) Deliberate Indifference

At approximately 1:27 AM, the plaintiff was beaten by the Joliet Police Officers Terrence Gruber #261 and Thomas Conroy #271. Plaintiff did not resist arrest in any way. Plaintiff was originally falsely charged with resisting arrest which later plaintiff was exonerated from the charges by the Will County States Attorneys Motion. The following officers: OFC. Badge #252, OFC. Badge #234, the supervisor at the scene Sgt.

Stefanski #82, and filed supervisor badge #64 shall be held accountable for Terrance Gruber #261 and Thomas Conroy #271 actions for kicking and punching the plaintiff on the ground while handcuffed. Defendants just stood by and did nothing to intercede to prevent their fellow police officers from using excessive force while plaintiff was being maliciously arrested and beaten. Each of the the defendants had the power and duty to restrain the other defendants and prevent them from violating the law and rights of the plaintiff, but that each of the defendants failed and refused to perform that duty, failed and refused to restrain the other defendants and became a party to the injuries inflicted on the plaintiff. Defendants would not let plaintiff seek medical attention. Defendants were acting in concert with Terrence Gruber #261 and Thomas Conroy #271. An accordance with a preconceived, customary plan. Defendants City of Joliet and Will County authorized, tolerated as institutionalized practices, and ratified the misconduct detained above by failing to properly discipline, restrict, and control employees, including defendants Terrence Gruber #261 and Thomas Conroy #271, known to be irresponsible in their dealings with citizens of the community. Failing to take adequate precautions in

the hiring, promotion, and retention of police personnel. Including specifically Terrence Gruber #261 and Thomas Conroy #271 for failing to establish or assure the functioning of a bona fide and meaningful departmental system for dealing with complaints with bureaucratic power and official denials calculated to mislead the public. As a consequence of the abuse of authority detained above, plaintiff sustained damages alleged in this compliant.

5.) Wrongfully Detained

On 3-18-11, plaintiff was transported to the Joliet Police Department. Upon the plaintiff's arrival, plaintiff was booked and processed. Plaintiff notice that the defendants no longer had the bottle of the pink vitamins and minerals but instead had them in a clear plastic baggy. Terrence Gruber #261 handed that over to the Evidence Technician Scott P. Cammack #285, who also made perjured testimony in the police reports stating that, "The pink like substance was tested and found to be positive for the presence of ecstasy." Plaintiff has a copy of the Evidence Technician reports regarding to his testing and will be used to this complaint and incorporated by reference in it as Exhibit "E." Defendants used perjured testimony in seeking to press charges on plaintiff. Plaintiff was charged and transported to the Will County Adult Detention Facility. Plaintiff was wrongfully detained and bound to appear in court and to answer to the states false charges. Upon the plaintiff's defense counsel request for the Illinois State Police Laboratory reports from the Joliet Forensic Science Laboratory proved that the defendants had been lying the whole time. The pink pills did not contain any substance for which the defendants tested and falsely said that it did. Plaintiff has a copy of the Illinois State Police

Laboratory reports and will be used to this complaint and incorporated by reference in it as Exhibit "F." The following evidence was submitted to the Joliet Forensic Science Laboratory on March 23, 2011. That's approximately 5 days after the plaintiff's malicious arrest. Plaintiff was wrongfully detained between 3-18-11, until 5-5-11 when the charges were dropped on the states motion. The defendants knew that they brought up false charges on plaintiff or after the laboratory reports, but instead committed to do nothing about their actions. Defendants acted wrongfully, recklessly, willfully, and maliciously with the intent of injuring and oppressing the plaintiff. The plaintiff was wrongfully detained without probable cause.

6.) False Imprisonment

On 3-18-11, the defendants police officers of the City of Joliet accusing plaintiff of having committed the crime of, unlawful possession of controlled substance under the laws of the state. On the same day at 1:20 AM, these police officers arrested plaintiff and restrained his liberty until plaintiff was discharged, as set out below. The plaintiff was arrested on the request, counsel, and command of the defendants. This arrest was made without a warrant or other legal process and was unlawful, in that no crime had been committed and in that there was no reason or cause for belief that plaintiff had committed any crime. In performing all of these acts, defendants were acting willfully and maliciously. After having been arrested, plaintiff was held in custody and restrained until later in the morning of 5-5-11. The plaintiff was released and discharged by the State's Motion issued and sustained by Judge Daniel J. Rozak. (See Exhibit "D") While under arrest and deprived of his liberty,

plaintiff was taken to a police station, fingerprinted, and booked, that is to say, plaintiff's name and pedigree were entered on the police records. According to the police practice on the arrest of criminals; and charge entered noting that the plaintiff had been arrested for unlawful possession of controlled substance. Prior to this arrest, plaintiff had enjoyed a good reputation in and out the City of Joliet, particularly for honesty. In order to obtain his release from this arrest and imprisonment, plaintiff was required to and did employ counsel and was required to expand additional sums of money as well. As a result of the acts described in this complaint, plaintiff was greatly humiliated and subjected to mental and bodily distress. The plaintiff spent at least 50 days incarcerated at the Will County Jail. That's time plaintiff can't get back. The plaintiff employment and college courses were disrupted. Plaintiff financial resources were drained. Plaintiff was dropped out of his college classes and was force to pay for his dropped classes. The plaintiff was unable to pay for his student loans and other bills and as a result to that, several collection actions were brought against the plaintiff, where it has effected his good credit scores. The plaintiff did lose his apartment and his cell phones were cut off and to be stuck with another unpaid bills. The plaintiff was subjected in to public obloquy and it had caused to curtail his associations and creating anxiety in the plaintiff's life, his friends and family. The plaintiff character was assassinated threw the news and social media. The plaintiff's car was towed and damages were done to the car upon the defendants searching the car. The plaintiff was forced to pay a $500 administrative fee, including the tow fee and $40 everyday that the car had to sit for being impounded. Plaintiff has a copy of the following-up report based

on, administrative fee receipt, car towed for, who towed the car, and being released. This will be used to this complaint incorporated by reference in it as Exhibit "G." That amount exceeded $755 dollars not including the damages done to the interior and exterior of the car. During the plaintiff's imprisonment, the plaintiff was beaten up by the E.R.T.'S which is another claim, that the plaintiff wishes not to pursue because of the fear of retaliation from the Will County Staff Members. The plaintiff was denied medical treatment for those injuries. In addition, upon the discharge date of the case, plaintiff was set a $5,000 at 10% bond that shouldn't have never been set in the first place. Plaintiff requests damages in the total sums of $10,600,000.00.

7.) Malicious Prosecution

On 3-18-11, defendant J. Kneller #200 from the Joliet Police Department executed an erroneous and false compliant on oath before the Judge of the County Court of the Twelfth Judicial Circuit of Will County, Illinois, falsely stating that, "The plaintiff did, on 3-18-11, unlawfully and willingly commit an act in violation of the Illinois statutes annotated, commonly known as unlawful possession of controlled substance," respectively. Plaintiff has a copy of this complaint and will be used as Exhibit "H" to this complaint and incorporated by reference in it. As a result of this false complaint a return of an indictment was file upon the plaintiff in the County of Will without probable cause. Plaintiff has a copy of the indictment and will be used as Exhibit "I" to this complaint and incorporated by reference. The defendants relied, wholly or, party on the false statements and allegations of defendants J. Kneller #200, Terrence Gruber #261, and the Evidence Technician Scott P. Cammack #285, in executing the

false complaint without probable cause. On 3-18-11, defendants of the Joliet Police Department falsely and erroneously arrested the plaintiff in Joliet, Illinois. The plaintiff was, taken into custody against his will by the defendants in the City of Joliet, and falsely imprisoned against his will at the Will County Adult Detention Facility in Illinois, from that date of arrest until 5-5-11. That was at least a period of 50 consecutive days. On 5-5-11, after plaintiff had been falsely imprisoned against his will for a period of 50 consecutive days, the complaint, information or indictment was, without trial, dismissed on the motion of the Will County Assistant State's Attorney Erin M. Krone, in Illinois and plaintiff was released from imprisonment. (See Exhibit "D") The charges alleged in the complaint were wholly untrue and false, and the complaint was caused to be issued by the defendants, here for reasons unknown to plaintiff at this time. The defendants falsely imprisoned plaintiff against his will and repeatedly refused and neglected to take reasonable and necessary action to ascertain the falsity of plaintiff's, imprisonment. These defendants could have during the duration of plaintiff's false imprisonment, ascertained that plaintiff was being falsely imprisoned had the defendants exercised reasonable diligence in performing his duties and not repeatedly refused to make reasonable and necessary factual investigation of the charges made against the plaintiff. As a result of his false arrest, malicious prosecution, and imprisonment, plaintiff suffered extreme humiliation and embarrassment during the duration of the false imprisonment. As a further result, plaintiff suffered severe mental anxiety and distress, as well as a severe nervous disorder of his entire body during the duration of the imprisonment. Further, plaintiff suffered physical injury and damage

to his entire body, particularly to his back, legs, hips, right wrist, hand, and mentally disturbed, which resulted in extreme physical pain and suffering during the duration of his false imprisonment, and continuing for an extended period of time afterward. As a further result of the imprisonment, plaintiff is suffering and will continue to suffer for the rest of his lifetime from mental distress, humiliation, embarrassment, and defamation of his character and reputation, which will, in part, cause him future loss of earnings and restrict his opportunities to hold respect and trusted positions in his employment and community. Plaintiff was injured in the total amount of not less than $10,600,000.00.

8.) Assault, Battery, and Negligence

On 3-18-11, at approximately 1:20 AM, plaintiff was stopped by the Joliet Police Department. It was a pretextual traffic stop which the plaintiff was a passenger of the vehicle. Defendant Terrence Gruber #261 forcibly took the plaintiff out of the vehicle causing him to lose his balance by tripping over a curve. Defendant Terrence Gruber #261 grabbed, tugged, and pulled the plaintiff, grabbed the plaintiff around the arms and torso and thrust the plaintiff face down toward the ground. The plaintiff braced his fall with his hands and pushed himself upon his hands and knees. Defendant Terrence Gruber #261 then came down by kneeing the plaintiff in his back. Defendant Terrence Gruber #261 who out weighed the plaintiff at least 150 pounds at the time maintained staying on the plaintiff's back. The plaintiff landed on the brick sidewalk surface, striking his head and chest against the bricks, immediately causing injuries to the plaintiff's body. Defendant Thomas Conroy #271 yelled, Quit resisting! The plaintiff responded, I'm not

resisting! When Terrence Gruber #261 had the plaintiff already in handcuffs the defendants started kicking and punching the plaintiff on the ground making derogatory remarks, to plaintiff. It was 3 to 5 additional Joliet Police Officers just stood by watched and did nothing. The tight handcuffs on the plaintiff's wrists, causing the plaintiff to experience pressure from the cuffs on his right wrist. The position of the short chain between the two cuffs and the tightness of the cuffs on the plaintiff made it impossible for the plaintiff to avoid the twisting and pressure caused by the improperly placed cuffs. The improper placement of the cuffs caused the plaintiff's hand to swell, resulting in numbness and soreness in the plaintiff's right wrist and hand. Defendants actions was not reasonable. The defendants purposely inflicted pain upon the plaintiff. The defendants assault and battered the plaintiff and there actions was in the form of negligence.

9.) Perjury

On 3-18-11, Defendants Terrence J. Gruber #261, Scott P. Cammack #258, and J. Kneller #200 is law enforcement officers employed by a law enforcement agency known as Joliet Police Department within Will County, Illinois. The defendants and each of them, knowingly, maliciously, and willfully conspired and agreed among themselves to nutritiously or unlawfully injure plaintiff by committing perjury, here in furtherance of their conspiracy and agreement, defendants Terrence J. Gruber #261 did in fact sign a affidavit in support of probable cause stating, "There reports prepared by him is true and correct." Plaintiff has a copy of affidavit in support of probable cause and it will be used as Exhibit "J" to this complaint and incorporated by reference in it. This is to prove

Terence J. Gruber #261 is under penalties as provided by law for false certification and perjury information. Terrence J. Gruber #261 and the other defendants shall be held accountable for perjury. For making false reports and maliciously arresting plaintiff without probable cause. Defendants unlawfully and wrongfully seizing plaintiff's person without probable cause, causing him unlawful detention and incarceration on serious charges that they knew or should have known were false. The defendants knowingly and willfully submitting false data regarding the transaction that led to the plaintiff's arrest. The defendants knowingly and willfully uttering false testimony that led to plaintiff's complaint and indictment. The defendants stated, "The test results at the Joliet Police Department was tested and came back as positive for ecstasy," which the defendants knew indeed was false testimony. (See Exhibit "F") And (See Exhibit "E") The defendants conspiring to suborn perjured police testimony. The Joliet Police Department failed to supervise or properly train the defendants and through their lack of proper supervision and training permitted these individuals to commit some or all of the acts complained of in the preceding complaint. The defendants fail to notify the plaintiff's attorney or the Will County District Attorney that defendants were falsifying their case files. As a result of the actions of the defendants, plaintiff was indicted under indictment #11 CF-546, arrested, held overnight in jail, was required to post bail, and incarcerated for 50 days or more. The charges was finally dismissed on 5-5-11. As a result solely of the acts of the defendants, plaintiff was denied fundamental rights, was deprived of liberty, and was forced to answer criminal charges of the most heinous nature. In addition, plaintiff was forced to undergo the mental scars of the ordeal. The

actions of the defendants were wanton, willful, unlawful, malicious, and vicious, without regard for the System of Justice in the United States.

10.) Intentional Infliction of Emotional Distress

What the plaintiff had to endure, he hasn't been right mentally and physically since the malicious acts took place. The plaintiff is suffering from depression, having a hard time to sleep where he has to take sleeping pills. He's paranoid of what wrongfully might happen to him next. Plaintiff haven't been able to keep a steady job because of the lack of motivation coming from the depression. The plaintiff doesn't talk or interact the same as how he use to since this incident took place. The plaintiff is starting to have suicidal thoughts on his life and is giving up on his communication to friends, family, and those who do try to help make the situation better. Plaintiff rarely comes outside fearing something will happen to him. The plaintiff is eating very poorly which in do time will cause bodily harm to the plaintiff. Defendants conduct in false reports, unlawful search and seizure, excessive force, battery, perjury, wrongfully arrested and false imprisonment circulating on 3-18-11, the arrest was intentional and malicious and done for the purpose of causing plaintiff to suffer humiliation and mental anguish. Defendant's conduct in confirming and ratifying these acts was done with knowledge that plaintiff would suffer emotional distress and was done with a wanton and reckless disregard of the consequences to the defendant's. On the date of arrest it had clearly exposed plaintiff to hatred, contempt, ridicule, and obloquy, because it falsely depicted defendant as a police officer who behaved in a heinous and criminal manner, who intentionally altered a crime scene, and who made false testimony in an attempt to frame the

plaintiff. As a direct and proximate result of the defendants scandalous and outrageous acts, plaintiff has suffered humiliation, mental anguish, and emotional distress, all to plaintiff's damages in an amount not less than $10,600,000.00.

11.) Official Capacity

The plaintiff is a citizen of the United States of America and a resident of Will County, Illinois. The defendant, City Of Joliet is a municipal corporation existing under color of law and by virtue of the laws of the State of Illinois. The defendant's, Joliet Police Department in the City of Joliet is a duly constituted municipal police agency that was created by functions under the control of the City Of Joliet. The defendant's named in this complaint was, at all material times, a member of the Joliet Police Department in the City of Joliet, County of Will. The actions of the officers constitute false and malicious arrest, perjury, I.D.S.D, assault and battery in violation of Illinois, common law. The City of Joliet is reliable to the plaintiff for the unlawful actions of the defendant's as they was acting within the scope of there employment as a law enforcement officer of the County of Will, in Illinois. The actions of the defendant's constitute negligence in violation of Illinois common law. The officers had a duty to the plaintiff not to place handcuffs on the plaintiff's wrists so that the mere placement of the handcuffs caused pain and injury. The officers breached their duty when they placed handcuffs on the plaintiff's wrists in the manner that caused the plaintiff pain and injury and without probable cause. This breach of their duty constituted negligence in violation of Illinois common law and was one of the direct and proximate cause of the plaintiff's pain and injury. The defendant's City of Joliet and the Joliet

Police Department is liable to the plaintiff for the unlawful actions of the officers as they were acting within the scope of their employment as law enforcement officers from the Joliet Police Department in the City Of Joliet. The actions of the officers set forth in this complaint violated the plaintiff's right to be free from unreasonable detention, abuse of due process, search and seizure, under the Fourth and Fourteenth Amendment of the United States Constitution. Defendants is liable to the plaintiff for these unlawful actions in violation of the United States Constitution of America.

V Relief:

The actions and omissions described in this complaint, engaged under the color of state authority by the defendants. (Including defendant the Will County Board, sue as a person and responsible because of its authorization, condemnation, and ratification of the acts of its agents), deprived the plaintiff of rights secured to him by the constitution of the United States. The defendants actions were done with the knowledge by defendants that these acts would cause plaintiff to suffer great humiliation, mental anguish, and injury. Defendants actions were, therefore, despicable conduct and so willful, wanton, intentionally and actually malicious and oppressive as to justify the award for damages. Solely as a result of these actions, plaintiff was deprived of his freedom for a period of time, suffered severe emotional trauma and injury, was subjected to great fear and terror, and personal humiliation and degradation has continued to suffer from mental and emotional distress as a result of the unlawful conduct of the defendants, and has been caused to fear repetition of the unlawful conduct by the defendants, and has been cause to fear repetition

of the unlawful conduct by the defendants or by other police officers. Each of the defendants, jointly and severely, acted maliciously, willfully, and wantonly, and outside the scope of his jurisdiction, although under color of law, and violated rights of the plaintiff's Fourth, Fourteenth, and Eighth Amendments. All of these rights are secured to the plaintiff by provisions of the Amendment of the Constitution in the United States of America and which all of the defendants named here in this compliant had clearly violated the plaintiff's rights. The defendants intentionally and for the purpose of causing sever mental distress conducted themselves toward in a manner so outrageous and shocking that it exceeded all reasonable bounds of decency. Defendants did at times and in the manner set forth above prosecuted the plaintiff maliciously without probable cause. Defendants were responsible for the institution or continuance of the original felony criminal proceedings against plaintiff The felony criminal proceedings instituted and continued against the plaintiff were wholly without legal or probable cause, were instituted and continued with malice, and the proceedings were terminated in favor of the plaintiff. (See Exhibit "D") Plaintiff's prayer for relief and seeks:

A. On all the claims stated in this complaint the plaintiff asks court to enter declaratory judgment against defendants, Will County Board, City Of Joliet, and the Joliet Police Department, and their employees named in this complaint;

B. An award of punitive and exemplary damages to plaintiff in an amount to be determined by the trier of facts as sufficient to punish each defendant against whom (plaintiff), these damages are

awarded and sufficient to deter similar conduct in the-future by these defendants;

C. An award of Special damages, pain and suffering damages for the injuries that the plaintiff suffered as a result of the claims stated in this complaint. The plaintiff asks the court to hold defendants jointly and severely liable for there malicious conducts;

D. An award of general and compensatory damages to plaintiff in an amount to be determined by the trier of fact as sufficient to compensate the plaintiff for the injuries described in this complaint;

E. An award of negligence and personal injury to plaintiff;

F. An award total in the sum: $10,600,000.00;

G. If this Honorable Court deems proper, that criminal charges be filed by the U.S Attorney Office, in this matter, pursuant to Illinois or Federal Criminal Statues against Officer Terrence J. Gruber #261, Thomas Conroy #271 for Battery, Assault, Perjury, and Police Misconduct, in further, officers Scott P Cammack #285, and J. Kneller #200 for Perjury;

H. An award of reasonable costs and expenses to plaintiff in this action, including attorney's fee if any; and

J. An award to plaintiff of all other relief that is justified proper.

VI. Plaintiff demands a jury trial of his constitutional claims against all the defendants named in this Civil Action.

CERTIFICATION

By signing this Complaint, I certify that the facts stated in this Complaint are true to the best of my knowledge, information and belief. I understand that if this certification is not correct, I may be subject to sanctions by the Court.

Signed this 10 day of April, 2013

/s/ Elijah Manuel
(Signature of plaintiff or plaintiff's)

Elijah Manuel
(Print name)

20112-0000555
(I.D. Number)

95 S. Chicago St.
Joliet, IL 60436

Official Seal
CHRISTINE A. MILLER
NOTARY PUBLIC – STATE OF ILLINOIS
MY COMMISSION EXPIRES 07/11/15

State of Illinois
County of Will
Signed before me (date) 4/10/13
/s/ Christine A. Miller
Signature of notary public

"Exhibit D"

5/05/11 09:08:32 WCCH

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

2011 MAY -4 PM 12

STATE
Plaintiff
vs
ELIJAH MANUEL
Defendant

No. [redacted]

COURT ORDER

SHOW THAT THE DEFENDANT IS PRESENT IN THE CUSTODY OF THE SHERIFF ON THE STATE'S MOTION, THIS MATTER IS ORDERED NOLLE PROSED THE DEFENDANT IS ORDERED RELEASED AS INSTANTER AS TO THIS MATER ONLY THE 11 TR 12668-70, 11 TR 19976, AND 10 TR 107172-73 ARE SET FOR STATUS IN COURTROOM 304 ON 5-5-11 AT 9AM. THE DEFENDANT'S BOND FOR 11 TR 12668-70, 11 TR 19976, AND 10 TR 107172-73 IS SET IN THE AMOUNT OF $ [redacted] - 10% TO APPLY, AND HE HAS $350 TO APPLY

ASA

Attorney or Party, if not represented by Attorney
Name TODD LESHE, ASD
ARDC #
Firm Name
Attorney for DEFENDANT
Address
City & Zip
Telephone

Dated: 5-4-11, 20
Entered:
Judge

WCCH 05052011

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

White - Court Yellow - Plaintiff Pink - Defendant

17 D Revised (06/06)

Joliet Police Department
Department Case Report

Department Case Number: 110318004686

Exhibit E

Related Case # 's:

Case Information

Case Officer: JPD261 - GRUBER TERRENCE J.
Offense Date/Time: 03/18/2011 - 01:20Hrs
Offense Location: ELMWOOD AND MILES
Offense Type: 2040 - DELIVERY/POSSESSION W/INTENT DELIVER CONTROLLED SUBSTANCE
Expiration Date: 03/18/2014
Jurisdiction: Will County
Court Date:
Disposition:
Disposition Date:
Case Comments:

Case Names

Name Type: Suspect/Arrestee
Name: Manuel, Elijah
Address: 1014 E CLINTON
Joliet,Il 60432
Additional Name Information:
Sex: M Race: B DOB: 06/01/1985
Home Phone#:
ID#:
SSN#:

Name Type: Victim
Name: STATE OF IL
Address: SPRINGFIELD, IL
Additional Name Information:
Sex: Race: DOB:
Home Phone#:
ID#:
SSN#:

Case Items

Item Number: 001
Container #:
Status/Location: Items Submitted to Property - Temporary Pass Thru Locker T20
Collection Date/Time: 03/18/2011 - 01:20Hrs
Collected By: JPD261 - GRUBER TERRENCE J.
Collection Location: ELMWOOD AND MILES
Packaging/Quantity/Item Type: One sealed envelope with: - 1 - Suspected Ecstasy
Detail Description: 16 PINK PILLS IN THE SHAPE OF THE UNITED STATES STAMPED WITH USA
Owner: Elijah Manuel
Weight : 7.30
Item Notes:
Process: Held for investigative purposes
Collection Purpose: Evidence
Hazmat: [NONE]
Weight Units : G - GRAMS

Lab Submissions

261 03/18/11

Date

Supervisor Signature

Joliet Forensic Science Laboratory
515 East Woodruff Road
Joliet, IL 60432
(815) 740-3543

Joliet Police
J11-002498
03/23/2011

LABORATORY SUBMITTAL FORM

CASE No. : 1103180004686 /

OFFENSE : 2040 DELIVERY/POSSESSION W/INTENT DELIVER CONTROLLED SUBSTANCE

DATE OF OFFENSE : 03/18/2011

SUBMITTING AGENCY: Agency

COURT DATE :

DELIVERING OFFICERS SIGNATURE

INVESTIGATED BY : GRUBER TERRENCE J.

PHONE No. : Phone#

FORWARD REPLY TO : CAMMACK SCOTT P.

NAME / SID #

(Name Type)	Case Name	(Gender)	(Race)	(DOB)	(SID #)
Suspect/Arrest ee	Manuel, Elijah	M	B	06/01/1985	
Victim	STATE OF IL				

SUBMISSION TYPE: HD - Hand Delivered
COMMENTS TO LAB: please examine for ecstacy

LIST OF SPECIMENS: (INDICATE DEFENDANT/LOCATION IF KNOWN)

Item Number: 001

Packaging: One sealed envelope with: 1 Suspected Ecstasy

Item Description: 16 PINK PILLS IN THE SHAPE OF THE UNITED STATES STAMPED WITH USA

Collected: 03/18/2011 1:20

Name: Elijah Manuel

Item Notes:

Exam: Drug Examination

use as Exhibit "E"

ILLINOIS STATE POLICE
Division of Forensic Services
Joliet Forensic Science Laboratory
515 East Woodruff Road
Joliet, Illinois 60432-1260
(815) 740-3543 (Voice) * 1-(800) 255-3323 (TDD)

Pat Quinn
Governor

Patrick E. Keen
Interim Director

April 1, 2011

LABORATORY REPORT

CAMMACK SCOTT P
JOLIET PD
150 WEST WASHINGTON STREET
JOLIET, IL 60432

Laboratory Case #J11-002490
Agency Case # 110318004686

OFFENSE Violation of Controlled Substances Act
SUSPECT Elijah Manuel

The following evidence was submitted to the Joliet Forensic Science Laboratory by E. Stanley on March 23, 2011:

LAB/AGENCY	ITEM SUBMITTED	FINDINGS
1A/001	1.4 grams of five pink tablets	No scheduled substance found
1B/001	3.1 grams of 11 pink tablets, consistent in appearance with Exhibit 1A	No Analysis

730 ILCS 5/5-9-1.4(b) states that a criminal laboratory analysis fee of $100 shall be imposed for persons adjudged guilty of an offense in violation of the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act.

Respectfully submitted,

Pamela M. Wilson
Forensic Scientist

cc: WILL CO SA

use as Exhibit "F"

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

[Filed 4/22/13]

Case No. 2011 CF 546

PEOPLE OF THE STATE OF ILLINOIS

vs.

ELIJAH MANUEL

CRIMINAL COMPLAINT

CHARGE

On this 18 day of March, 2011, complainant J. KNELLER #200 charges the commission of an offense as follows:

on or about March 18, 2011, at and within Will County, Illinois, ELIJAH MANUEL, a male person, committed the offense of:

UNLAWFUL POSSESSION OF A
CONTROLLED SUBSTANCE
(Class 4 Felony)

in that, said defendant, knowingly and unlawfully possessed a substance containing methlenedoixymeth-amphetamine, a controlled substance, other than as authorized in the Illinois Controlled Substances Act, in violation of Chapter 720, Section 570/402(c), of the Illinois Compiled Statutes, 2011 and AOIC 5101110.

OATH

The undersigned being duly sworn on oath says that the foregoing charge is true.

SIGNED: /s/ J. Kneller #200

Subscribed and sworn to before me on
18 day of March, 2011.

/s/ Nichole A Wierzbowski
Judge or Notary Public

OFFICIAL SEAL
NICHOLE A WIERZBOWSKI
NOTARY PUBLIC — STATE OF ILLINOIS
MY COMMISION EXPIRES 10/18/14

MJC/nas
JPD #11-0318004686
dcn #L52163797

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

Case No. 2011 CF 546

PEOPLE OF THE STATE OF ILLINOIS

vs.

ELIJAH MANUEL

BILL OF INDICTMENT

Indictment returned by Grand Jury empaneled by the Circuit Court of the Twelfth Judicial Circuit, County of Will, State of Illinois, on February 16, 2011.

The GRAND JURORS, chosen, selected and sworn, in and for the County of Will in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that:

on or about March 18, 2011, at and within Will County, Illinois, ELIJAH MANUEL, a male person, committed the offense of:

UNLAWFUL POSSESSION OF A
CONTROLLED SUBSTANCE
(Class 4 Felony)

in that said defendant knowingly and unlawfully possessed a substance containing methylenedioxymethamphetamine, a controlled substance, other than as authorized in the Controlled Substances Act, in violation of Chapter 720, Section 570/402(c), of the Illinois Compiled Statutes, 2011, contrary to the

Statute, and against the peace and dignity of the same People of the State of Illinois.

A TRUE BILL

/s/ Christine Sarley
Foreman of the Grand Jury

FILED MARCH 31, 2011

LIST OF WITNESSES

WHO TESTIFIED BEFORE GRAND JURY

Terrence Gruber

/s/ Christine Sarley
Foreman of the Grand Jury

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY

The within indictment returned in open Court 3/31/11

BAIL SET AT $ 50000-10%

Warrant of Arrest ☐ ordered ☒ stayed to issue.

/s/ [Illegible]
Judge of the Circuit Court

PREVIOUS CONDITIONS
OF BOND
TO REMAIN IN EFFECT

FILED MARCH 31, 2011

REPORT #
LJ1-110318004686

ARREST REPORT SUPPLEMENT

JOLIET POLICE DEPARTMENT
150 WEST WASHINGTON STREET
JOLIET, IL 60432

ARRESTEE'S NAME	SEX	RACE	DOB
MANUEL, ELIJAH	M	B	6/1/85

☒	FELONY	GANG AFFILIATION			
		GANG NAME NONE			
☐	MISDEMEANOR	☐	SELF-ADMITTED	☐	OFFICER'S KNOWLEDGE

SPECIAL CAUTIONS (HEALTH, OFFICER SAFETY, OTHER)

STATED NONE

EMERGENCY NOTIFICATION INFORMATION

NAME	ADDRESS	PHONE	RELATIONSHIP
MANUEL, DEBORAH	1014 CLINTON ST	815 722-7001	MOTHER

STATE'S ATTORNEY APPROVAL BY:	

AFFIDAVIT IN SUPPORT OF PROBABLE CAUSE

The undersigned officer, under penalties as provided by law for false certification pursuant to Section 1-109 of the Code of Civil Procedure and perjury pursuant to 720 ILS 32-2, hereby certifies that he/she is a law enforcement officer employed by a law enforcement agency within Will County, Illinois and that he/she has reviewed and signed the attached reports prepared by him/her and upon information and belief the information contained in the reports is true and correct to the best of his/her knowledge at this time and the said reports were prepared during the normal course of an official law enforcement investigation and the said reports are hereby incorporated into and made a part of this affidavit to support a finding of probable cause to believe the above captioned detainee(s) have/has committed the above named offense(s).

Officer's Signature and Star No

Department

Officer's Printed Name

use as Exhibit 5

ATTACH TO WILL COUNTY ADULT DETENTION ARREST REPORT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed: 09/20/13]

Case No.: 13 C 3022

ELIJAH MANUEL,

Plaintiff,

v.

CITY OF JOLIET, a municipal corporation, OFC. TERRENCE J. GRUBER, OFC. THOMAS CONROY, SGT. SCOTT P. CAMMACK, OFC. AARON BANDY, OFC. JEFFREY GERMAN, SGT. JOHN STEFANSKI, SGT. JOSEPH ROSADO, OFC. JEFFREY KNELLER, UNKNOWN OFFICERS OF THE WILL COUNTY SHERIFF'S OFFICE, and WILL COUNTY,

Defendants.

Judge Milton I. Shadur

Magistrate Judge Young B. Kim

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

JURY DEMANDED

FIRST AMENDED COMPLAINT

JURISDICTION AND VENUE

1. This action arises under the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. § 1983). This court has jurisdiction under and by virtue of 28 U.S.C. §§ 1343, 1331, and 1367

2. Venue is founded in this judicial court upon 28 U.S.C. § 1391 as the acts complained of arose in this district.

PARTIES

3. At all times herein mentioned, Plaintiff Elijah Manuel (hereinafter "MANUEL" or "PLAINTIFF") was and is a citizen of the United States, and was within the jurisdiction of this court.

4. At all times herein mentioned, Defendant Joliet Police Officer Terrence J. Gruber, Star No. 261 (hereinafter "GRUBER"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity

5. At all times herein mentioned, Defendant Joliet Police Officer Thomas Conroy, Star No. 271 (hereinafter "CONROY"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

6. At all times herein mentioned, Defendant Joliet Police Sergeant Scott P. Cammack, Star No. 285 (hereinafter "CAMMACK"), was employed by the City of Joliet Police Department, and was acting under

color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

7 At all times herein mentioned, Defendant Joliet Police Officer Aaron Bandy, Star No. 252 (hereinafter "BANDY"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

8. At all times herein mentioned, Defendant Joliet Police Officer Jeffrey German, Star No. 234 (hereinafter "GERMAN"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

9. At all times herein mentioned, Defendant Joliet Police Sergeant John Stefanski, Star No. 82 (hereinafter "STEFANSKI"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

10. At all times herein mentioned, Defendant Joliet Police Sergeant Joseph Rosado, Star No. 64 (hereinafter "ROSADO"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department.

This Defendant is being sued in his individual and official capacity.

11. At all times herein mentioned, Defendant Joliet Police Officer Jeffrey Kneller, Star No. 200 (hereinafter "KNELLER"), was employed by the City of Joliet Police Department, and was acting under color of state law and as the employee, agent, or representative of the City of Joliet Police Department. This Defendant is being sued in his individual and official capacity.

12. At all times herein mentioned, an unknown number of unnamed Will County Sheriff's officers ("Unknown Officers") were employed by the Will County Sheriff, and were acting under color of state law and as the employees, agents, or representatives of the Will County Sheriff. These Defendants are being sued in their individual and official capacities. Upon discovery of their identities, Plaintiff will amend the complaint to add them as defendants.

13. At all times herein mentioned, the City of Joliet was a political division of the State of Illinois, existing as such under the laws of the State of Illinois. At all relevant times, the City of Joliet maintained, managed, and/or operated the Joliet Police Department.

14. At all times herein mentioned, Will County was a political division of the State of Illinois, existing as such under the laws of the State of Illinois. At all relevant times, Will County maintained, managed, and/or operated the Will County Sheriff's Office.

FACTUAL ALLEGATIONS

15. Plaintiff had numerous interactions with Defendants Conroy and Gruber prior to March 18, 2011.

16. Defendants Conroy and Gruber have stopped the Plaintiff on numerous occasions without justification.

17. Defendants Conroy and Gruber have harassed the Plaintiff on several occasions prior to and subsequent to March 18, 2011.

18. On these prior occasions, the Plaintiff has been stopped by Defendants Conroy and Gruber because Defendants Conroy and Gruber have knowledge that the Plaintiff's brother, Floyd Faint, has had numerous problems with the law.

19. The Plaintiff also had an interaction with Defendant Stefanski prior to March 18, 2011, during which interaction Defendant Stefanski had unsuccessfully attempted to charge the Plaintiff with criminal charges.

20. On or about March 18, 2011, the Plaintiff was lawfully in a public place, in the city of Joliet, Will County, Illinois.

21. The Plaintiff was sitting on the passenger side of his vehicle, a 2008 Dodge Charger.

22. The Plaintiff's brother, Jeffrey Faint, was in the driver's seat.

23. On that day and place Defendant Gruber stopped Plaintiff's vehicle and opened the Plaintiff's passenger door, where Plaintiff was sitting.

24. Defendant Gruber seized the Plaintiff.

25. Plaintiff did not consent to being seized.

26. There was no outstanding arrest warrant for the Plaintiff.

27. There was no legal cause to stop and/or seize the Plaintiff.

28. There was no probable cause to stop and/or seize the Plaintiff.

29. During the course of seizing the Plaintiff, Defendant Gruber forcefully removed the Plaintiff from the vehicle.

30. Defendant Gruber yelled something similar to: "You remember me? I got you now you fucking nigger."

31. Defendant Gruber pushed the Plaintiff to the ground.

32. Defendant Gruber used unnecessary, unreasonable, and excessive additional force on the Plaintiff, while the Plaintiff was on the ground.

33. There was no legal cause for Defendant Gruber to use force against the Plaintiff.

34. Defendant Gruber's use of unnecessary, unreasonable, and excessive force injured the Plaintiff; specifically the Plaintiff sustained injuries to his back, head, and hand.

35. Defendant Gruber conducted a search of the Plaintiff's person, including a pat down.

36. Defendant Gruber did not have probable cause to search the Plaintiff's person.

37 Defendant Gruber did not have legal cause to search the Plaintiff's person.

38. Defendant Gruber located a bottle of vitamins on the Plaintiff's person, which contained vitamins in the form of pills or capsules.

39. Defendant Conroy witnessed Defendant Gruber use force on the Plaintiff.

40. Defendant Conroy knew that Defendant Gruber was using unnecessary, unreasonable, and excessive force on the Plaintiff.

41. Defendant Conroy had a realistic opportunity to prevent the harm from occurring.

42. Defendant Conroy failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

43. Defendant Conroy's failure to act caused the Plaintiff to suffer harm.

44. Defendant Conroy witnessed Defendant Gruber search the Plaintiff.

45. Defendant Conroy knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

46. Defendant Conroy had a realistic opportunity to prevent the harm from occurring.

47. Defendant Conroy failed to take any action to prevent the unlawful search.

48. Defendant Conroy's failure to act caused the Plaintiff to suffer harm.

49. Defendant Conroy seized the Plaintiff's brother, Jeffrey Faint.

50. Defendant Sergeant John Stefanski was also at the scene of the incident on March 18, 2011.

51. Defendant Stefanski witnessed Defendant Gruber use force against the Plaintiff.

52. Defendant Stefanski knew that Defendant Gruber was using unreasonable, unnecessary, and excessive force on the Plaintiff.

53. Defendant Stefanski had a realistic opportunity to prevent the harm from occurring.

54. Defendant Stefanski failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

55. Defendant Stefanski's failure to act caused the Plaintiff to suffer harm.

56. Defendant Stefanski witnessed Defendant Gruber search the Plaintiff.

57 Defendant Stefanski knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

58. Defendant Stefanski had a realistic opportunity to prevent the harm from occurring.

59. Defendant Stefanski failed to take any action to prevent the unlawful search.

60. Defendant Stefanski's failure to act caused the Plaintiff to suffer harm.

61. Defendant Officer Aaron Bandy was also at the scene of the incident on March 18, 2011.

62. Defendant Bandy witnessed Defendant Gruber use force against the Plaintiff.

63. Defendant Bandy knew that Defendant Gruber was using unreasonable, unnecessary, and excessive force on the Plaintiff.

64. Defendant Bandy had a realistic opportunity to prevent the harm from occurring.

65. Defendant Bandy failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

66. Defendant Bandy's failure to act caused the Plaintiff to suffer harm.

67. Defendant Bandy witnessed Defendant Gruber search the Plaintiff.

68. Defendant Bandy knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

69. Defendant Bandy had a realistic opportunity to prevent the harm from occurring.

70. Defendant Bandy failed to take any action to prevent the unlawful search.

71. Defendant Bandy's failure to act caused the Plaintiff to suffer harm.

72. Defendant Officer Jeffrey German was also at the scene of the incident on March 18, 2011.

73. Defendant German witnessed Defendant Gruber use force against the Plaintiff.

74. Defendant German knew that Gruber was using unnecessary, unreasonable, and excessive force against the Plaintiff.

75. Defendant German had a realistic opportunity to prevent harm from occurring.

76. Defendant German failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

77. Defendant German's failure to act caused the Plaintiff to suffer harm.

78. Defendant German witnessed Defendant Gruber search the Plaintiff

79. Defendant German knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

80. Defendant German had a realistic opportunity to prevent the harm from occurring.

81. Defendant German failed to take any action to prevent the unlawful search.

82. Defendant German's failure to act caused the Plaintiff to suffer harm.

83. Defendant Sergeant Joseph Rosado was also at the scene of the incident on March 18, 2011.

84. Defendant Rosado witnessed Gruber use force against the Plaintiff.

85. Defendant Rosado knew that Gruber was using unreasonable, unnecessary, and excessive force on the Plaintiff.

86. Defendant Rosado had a realistic opportunity to prevent the harm from occurring.

87 Defendant Rosado failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

88. Defendant Rosado's failure to act caused the Plaintiff to suffer harm.

89. Defendant Rosado witnessed Defendant Gruber search the Plaintiff.

90. Defendant Rosado knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

91. Defendant Rosado had a realistic opportunity to prevent the harm from occurring.

92. Defendant Rosado failed to take any action to prevent the unlawful search.

93. Defendant Rosado's failure to act caused the Plaintiff to suffer harm.

94. Defendant Officer Jeffrey Kneller was also at the scene of the incident on March 18, 2011.

95. Defendant Kneller witnessed Gruber use force against the Plaintiff.

96. Defendant Kneller knew that Gruber was using unreasonable, unnecessary, and excessive force on the Plaintiff.

97. Defendant Kneller had a realistic opportunity to prevent the harm from occurring.

98. Defendant Kneller failed to take any action to protect the Plaintiff from the force used by Defendant Gruber.

99. Defendant Kneller's failure to act caused the Plaintiff to suffer harm.

100. Defendant Kneller witnessed Defendant Gruber search the Plaintiff.

101. Defendant Kneller knew that Defendant Gruber had no legal cause to search the Plaintiff's person.

102. Defendant Kneller had a realistic opportunity to prevent the harm from occurring.

103. Defendant Kneller failed to take any action to prevent the unlawful search.

104. Defendant Kneller's failure to act caused the Plaintiff to suffer harm.

105. Defendant Stefanski searched the Plaintiff's car.

106. Defendant Stefanski was without legal cause to search the Plaintiff's car.

107. Defendant Conroy searched the Plaintiff's car.

108. Defendant Conroy was without legal cause to search the Plaintiff's car.

109. Defendant Gruber searched the Plaintiff's car.

110. Defendant Gruber was without legal cause to search the Plaintiff's car.

111. During the Defendants' search of the Plaintiff's vehicle, damage was sustained to the interior of the Plaintiff's vehicle.

112. Unknown Joliet Police Officer Defendants at the scene field tested the pills to determine if the pills were a controlled substance.

113. The field test revealed that the pills were not a controlled substance.

114. The Defendants on the scene were aware that the pills confiscated from the Plaintiff's person were not a controlled substance.

115. Defendant Gruber handcuffed and arrested the Plaintiff with the assistance of another Defendant on the scene.

116. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller knew that they had no legal cause or probable cause to arrest the Plaintiff.

117 Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller did not take any steps to prevent the arrest of the Plaintiff or to release the Plaintiff, after he was arrested.

118. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller had the ability and duty to cause the Plaintiff to be released from police custody due to the lack of probable cause.

119. The Plaintiff is informed and believes and alleges thereon that Defendants Gruber, Conroy, Stefanski, Bandy, German, Rosado, Kneller, and Cammack entered into an agreement to improperly search, falsely arrest, and bring false criminal charges against the Plaintiff. The Plaintiff is informed and believes and alleges thereon that Defendants Gruber, Conroy, Stefanski, Bandy, German, Rosado, Kneller, and Cammack conspired with one another to cause the Plaintiff to be improperly searched and to be falsely arrested and to bring false criminal charges against the Plaintiff.

120. The Plaintiff was transported to the Joliet police station on Washington Street in Joliet, Illinois where he was imprisoned.

121. At the Joliet police station on Washington Street, Defendant Cammack tested the pills confiscated from the Plaintiff.

122. The Plaintiff is informed and believes and alleges thereon that the test results showed that the pills were not a controlled substance.

123. The Plaintiff is informed and believes and alleges thereon that all named Defendants lied about the results of the test and claimed that the test showed a positive result for a controlled substance.

124. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack knew that the pills were not a controlled substance.

125. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack knew that they had no legal cause or probable cause to detain Manuel in police custody.

126. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack did not take steps to release Manuel from police custody.

127. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack had the ability and duty to cause the Plaintiff to be released from police custody.

128. On or about March 18, 2011, Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack caused false criminal charges to be brought against Plaintiff for possession of a controlled substance, with intent to deliver.

129. The Defendants caused these charges to be brought against the Plaintiff without probable cause of illegal conduct by the Plaintiff

130. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack had no legal cause or probable cause to charge the Plaintiff with possession of a controlled substance.

131. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, Kneller, and Cammack did not take steps to cause Plaintiff to be released from police custody.

132. Plaintiff was transferred to the Will County Adult Detention Facility (WCADF), run by Will County, on or about March 18, 2011.

133. At the WCADF, the Plaintiff requested medical attention for his injuries resulting from the arrest.

134. The Plaintiff's request for medical attention was ignored.

135. The Plaintiff suffered from serious medical injuries to his back, head, and hand.

136. Later, the charge against the Plaintiff was changed to a Class 4 felony, possession of a controlled substance.

137. The Illinois state police laboratory tested the pills confiscated from the Plaintiff.

138. The state police laboratory reported that the pills tested negative for a controlled substance.

139. On or about May 4, 2011, the charges were dismissed in Plaintiff's favor. Soon thereafter, Plaintiff was released from custody.

140. Upon the dismissal of the charges, Plaintiff first became aware that Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado and Kneller's search and seizure of the Plaintiff was unlawful.

141. Prior to May 5, 2011, the Plaintiff was unable to bring claims related to his March 18, 2011, arrest because he had been in custody.

142. Defendants Gruber, Conroy, and Stefanski have engaged in a pattern and practice of harassing the Plaintiff without legal justification.

143. The Joliet Police Department is aware of Defendants Gruber and Conroy's disparate treatment of racial minorities and has not required the individuals to undergo any additional training.

144. The Joliet Police Department has a policy or practice of, or is aware that their employees have a custom of, stopping individuals, arresting individuals, and charging individuals on the basis of racial profiling.

145. The Joliet Police Department is aware that their employees have a custom of using excessive force.

146. The Joliet Police Department has a policy or practice of, or is aware that their employees have a custom of stopping citizens without legal justification, searching citizens without legal justification or probable cause, arresting citizens without legal justification or probable cause, falsifying evidence, and bringing charges without legal justification.

147. The Will County Sheriff's Office has a policy or practice of or is aware that their employees have a custom of, failing to provide medical care to detainees who have requested medical attention for serious medical conditions.

148. By reason of the above-described acts and omissions of Defendants, Plaintiff sustained injuries, including but not limited to, humiliation and indignities, and suffered great mental and emotional pain and suffering all to his damage in an amount to be ascertained.

149. The aforementioned acts of Defendants were willful, wanton, malicious, oppressive and done with reckless indifference to and/or callous disregard for Plaintiff's rights and justify the awarding of exemplary and punitive damages in an amount to be ascertained according to proof at the time of trial.

150. Plaintiff was appointed an attorney to institute, prosecute, and render legal assistance to him in the within action so that he might vindicate the loss and impairment of his rights. By reason thereof, Plaintiff requests payment by Defendants of a reasonable sum for attorney's fees pursuant to 42 U.S.C. § 1988, the Equal Access to Justice Act, or any other provision set by law.

COUNT I

Plaintiff Against Defendant Gruber for UNREASONABLE SEIZURE

151. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

152. By reason of the conduct by Defendant Gruber, Plaintiff was deprived of rights, privileges and immunities secured to him by the Fourth and/or Fourteenth Amendments to the Constitution of the United States and laws enacted thereunder.

153. The arbitrary intrusion by Defendant, into the security and privacy of Plaintiff's person was in violation of Plaintiff's Constitutional Rights and not authorized by law. The Defendant violated the Plaintiff's rights in the following manner: the seizure of Plaintiff was without any legal cause. The foregoing was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's rights.

Therefore, the Defendant is liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT II

Plaintiff Against Defendant Conroy for
UNREASONABLE SEIZURE

154. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

155. By reason of the conduct by Defendant Conroy, Plaintiff was deprived of rights, privileges, and immunities secured to him by the Fourth and/or Fourteenth Amendments to the Constitution of the United States and laws enacted thereunder.

156. The arbitrary intrusion by Defendant Conroy, into the security and privacy of Plaintiff's person was in violation of Plaintiff's Constitutional Rights and not authorized by law. Defendant Conroy violated the Plaintiff's rights in the following manner: the seizure of Plaintiff was without legal cause. The foregoing was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's rights. Therefore, Defendant Conroy is liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT III

Plaintiff Against Defendant Gruber for
EXCESSIVE FORCE

157 Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

158. During and immediately after Plaintiff's seizure, Defendant Gruber used excessive force against Plaintiff's person.

159. There was no legal cause for Defendant Gruber to use force against Plaintiff.

160. By reason of Defendant's conduct, Plaintiff was deprived of rights, privileges, and immunities secured to him by the Fourth and/or Fourteenth Amendment to the Constitution of the United States and laws enacted thereunder.

161. The physical violence inflicted upon Plaintiff by Defendant Gruber was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's Fourth and/or Fourteenth Amendment Rights. Therefore, Defendant is liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT IV

Plaintiff against Defendants Conway, Gruber, and Stefanski for UNREASONABLE SEARCH

162. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

163. By reason of Defendants' conduct, Plaintiff was deprived of rights, privileges, and immunities secured to him by the Fourth and/or Fourteenth Amendments of the Constitution of the United States and laws enacted thereunder.

164. The arbitrary intrusion by Defendants, into the security and privacy of Plaintiff's car was in violation of Plaintiff's Constitutional Rights and not authorized by law. Defendants violated Plaintiff's rights in the following manner: (1) searching the Plaintiff's person; (2) patting down the Plaintiff; (3) causing excessive and unnecessary property damage to Plaintiff's automobile; and (4) conducting these

actions without legal or probable cause. These acts were in violation of Plaintiff's Fourth and/or Fourteenth Amendment rights. Therefore, Defendants Conway, Gruber, and Stefanski, in their individual capacity are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT V

Plaintiff Against Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller For VIOLATION OF PLAINTIFF'S DUE PROCESS RIGHTS

165. Plaintiff incorporates and alleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place. Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller and each of them, individually and in conspiracy with one another by 1) depriving Plaintiff of a fair process by submitting false charges as contained in the criminal complaint and indictment and 2) falsely imprisoning Plaintiff beyond a preliminary hearing.

166. The acts described in the preceding paragraph were directed toward Plaintiff, were intentional and material, and therefore in violation of Plaintiff's due process rights. Therefore, the Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

167. Each of the individual Defendants' conduct was in violation of the Fourth, and/or Fourteenth Amendments to the United States Constitution and laws enacted thereunder. As a result, these

Defendants are liable to Plaintiff under, but not limited to, 42 U.S.C. §1983.

COUNT VI

Plaintiff Against Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller For CONSPIRACY TO DEPRIVE PLAINTIFF OF CONSTITUTIONAL RIGHTS

168. Plaintiff hereby incorporates and re-alleges paragraphs one (1) through one hundred fifty (150) herein as though fully alleged in this place.

169. As alleged, Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller entered into a conspiracy by engaging in joint action and entering into an agreement to harass Plaintiff by falsely arresting and bringing false criminal charges against Plaintiff.

170. Defendants' overt act of falsely arresting and bringing false criminal charges against Plaintiff in furtherance of said agreement resulted in the deprivations of rights, privileges, and immunities secured to him by the Fourth and Fourteenth Amendments to the Constitution of the United States and laws enacted thereunder.

171. The acts described constituted a wrongful seizure and a violation of Plaintiff's due process rights. Therefore, Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, Kneller and each of them, individually and in conspiracy with one another is liable for conspiracy under 42 U.S.C. § 1983.

COUNT VII

Plaintiff Against Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller For UNREASONABLE DETENTION

172. Plaintiff incorporates and alleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

173. After Plaintiff was seized and transported to a City of Joliet Police Department facility Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller failed to take any steps to cause Plaintiff to be released from police custody

174. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller knew Plaintiff was being held in police custody despite the fact that there was no probable cause to arrest him, or to continue detaining him in police custody.

175. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller had the ability and duty to cause Plaintiff to be released from police custody due to the lack of probable cause supporting his arrest and continued detention in police custody.

176. Defendants' arbitrary and baseless detention of Plaintiff was in violation of Plaintiff's Constitutional Rights and not authorized by law. The foregoing was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's rights. Therefore, Defendants are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT VIII

Plaintiff Against Defendant Cammack For UNREASONABLE DETENTION

177. Plaintiff incorporates and alleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

178. After Plaintiff was seized and transported to a City of Joliet Police Department facility Defendant Cammack failed to take any steps to cause Plaintiff to be released from police custody.

179. Defendant Cammack knew Plaintiff was being held in police custody despite the fact that there was no probable cause to continue detaining him in police custody.

180. Defendants Cammack had the ability and duty to cause Plaintiff to be released from police custody due to the lack of probable cause supporting his continued detention in police custody.

181. Defendant's arbitrary and baseless detention of Plaintiff was in violation of Plaintiff's Constitutional Rights and not authorized by law. The foregoing was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's rights. Therefore, Defendant is liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT IX

Plaintiff Against Defendants Conroy, Bandy, German, Stefanski, Rosado, and Kneller For FAILURE TO INTERVENE

182. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

183. Defendant Gruber used excessive force against Plaintiff's person.

184. There was no legal cause for Defendant Gruber to use force against Plaintiff.

185. Defendants Conroy, Bandy, German, Stefanski, Rosado, and Kneller had the ability and opportunity to stop Defendant Gruber from using excessive force against Plaintiff but failed to do so.

186. By reason of these acts and/or omissions by Defendants Conroy, Bandy, German, Stefanski, Rosado, and Kneller, Plaintiff was deprived of rights, privileges, and immunities secured to him by the Fourth and/or Fourteenth Amendment to the Constitution of the United States and laws enacted thereunder.

187. The physical violence inflicted upon Plaintiff by Defendant Gruber was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's Fourth Amendment Rights. Therefore, Defendants Conroy, Bandy, German, Stefanski, Rosado, and Kneller are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT X

Plaintiff Against Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller, For UNEQUAL PROTECTION OF THE LAWS

188. Plaintiff hereby incorporates and re-alleges paragraphs one (1) through one hundred fifty (150) herein as though fully alleged at this place.

189. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller are employees of the Joliet Police Department and they acted with the intent to deprive Plaintiff of equal protection of the laws guaranteed to Plaintiff under the Constitution of the United States of America when they searched Plaintiff's vehicle without legal cause, arrested Plaintiff without legal cause, and initiated prosecution without legal cause.

190. There was no probable cause to search, arrest, charge, or detain the Plaintiff.

191. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller acted to discriminate against Plaintiff because of his race in the administration and enforcement of the laws and in violation of the Fourteenth Amendment to the Constitution.

192. Therefore, Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller are liable to Plaintiff for the unequal protection of the laws under 42 U.S.C. § 1983.

COUNT XI

Plaintiff Against Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller For SELECTIVE PROSECUTION

193. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

194. By reason of the conduct of Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller, Plaintiff was deprived of rights, privileges, and immunities secured to him by the due process clause as contained in the Fifth and/or Fourteenth Amendments to the United States Constitution.

195. Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller selectively arrested and caused Plaintiff to be prosecuted in violation of his due process rights because Defendants failed to bring charges against Caucasian lawbreakers who were similarly situated in all respects.

196. The acts were intentional and material, and therefore in violation of Plaintiff's due process rights. Therefore, Defendants Gruber, Conroy, Bandy, German, Stefanski, Rosado, and Kneller are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT XII

Plaintiff Against The City of Joliet For MONELL LIABILITY

197. Plaintiff incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

198. During all relevant times, the City of Joliet knowingly, and with willful and deliberate indifference to the Constitutional rights of citizens, maintained and permitted a widespread custom and practice of permitting the occurrence of the types of wrongs set forth in the following paragraph.

199. During all relevant times, the City of Joliet maintained a widespread custom and practice of its police officers stopping individuals based on racial profiling, harassing particular individuals without legal cause, searching citizens' property without legal cause, falsifying evidence, detaining citizens without cause, initiating arrest without legal cause, and initiating prosecution without legal cause.

200. Further, during all relevant times, the City of Joliet failed to train its police officers and/or detectives to: engage only in reasonable search and seizure; use proper, rather than excessive, force; not falsify evidence: not detain citizens without legal cause; refrain from racial profiling; and not initiate prosecution without legal cause.

201. Plaintiff alleges that these customs, policies, and training, described above, were the moving force behind the violations of the Plaintiff's rights. During all relevant times, the law required that citizens only be subject to reasonable search and seizure and not be subject to excessive force, false arrest, false charges, or malicious prosecution, or unequal treatment under the law. Based upon the principles set forth in *Monell v. New York City Department of Social Services*, 436 U.S. 658, (1978), the City of Joliet is liable for all the harm done to Plaintiff as set forth above.

202. As a result of the unlawful search and seizure, excessive force, failure to intervene, malicious prosecution, false arrest, unlawful detention, due process violation, and unequal treatment under the law, the Plaintiff was injured in all the ways set forth above, and as a result, the City of Joliet is liable under 42 U.S.C. §1983.

COUNT XIII

Plaintiff Against Unknown Defendants For FAILURE TO PROVIDE MEDICAL CARE

203. Plaintiff hereby incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

204. Plaintiff was arrested and transported to the jail at the Will County Adult Detention Center.

205. That at the aforesaid place and time the Unknown Defendants were acting within the scope of their employment, as employees of the Will County Sheriff's Office.

206. Unknown Defendants knew, from being informed by Plaintiff, or should have known that Plaintiff had a serious medical need and was in need

of immediate medical care and/or medication. Further, through the Defendants' willful and wanton conduct, Defendants failed to take reasonable action to summon medical care.

207. As a result of the foregoing, Plaintiff has sustained injuries including, but not limited to, physical, mental, and emotional pain and suffering all to his detriment.

208. The lack of medical care or attention inflicted upon Plaintiff by Defendants was unnecessary, unreasonable, and excessive, and was therefore in violation of Plaintiff's Eighth Amendment Rights. Therefore, Defendants are liable to Plaintiff pursuant to 42 U.S.C. § 1983.

COUNT XIV

Plaintiff Against Will County For MONELL LIABILITY

209. Plaintiff incorporates and realleges paragraphs one (1) through one hundred fifty (150) herein as though fully set forth at this place.

210. During all relevant times, Will County knowingly, and with willful and deliberate indifference to the Constitutional rights of citizens, maintained and permitted a widespread custom and practice of permitting the occurrence of the types of wrongs set forth in the following paragraph.

211. During all relevant times, Will County maintained and permitted a widespread custom and practice of its employees being deliberately indifferent to the serious medical needs of the detainees of the Will County Adult Detention Facility.

212. Further, during all relevant times, Will County failed to train its police officers and/or detectives to properly assess a detainee's serious medical need or to seek medical attention for a detainee's serious medical need.

213. Plaintiff alleges that these customs, policies, and failure to train, described above, were the moving force behind the violations of the Plaintiff's rights. During all relevant times, the law required that citizens be subject to due process of law and not be subject to cruel or unusual punishment. Based upon the principles set forth in *Monell v. New York City Department of Social Services*, 436 U.S. 658, (1978), Will County is liable for all the harm done to Plaintiff as set forth above.

COUNT XV

Plaintiff Against Will County For INDEMNIFICATION

214. Plaintiff hereby incorporates and realleges Paragraphs one (1) through one hundred fifty (150) heretofore as though fully set forth at this place.

215. Pursuant to 745 ILCS 10/9 — 102, 55 ILCS 5/4 — 6003, and 55 ILCS 5/5 — 1106, Will County is empowered and directed to pay any judgment for compensatory damages (and any associated attorneys' fees and costs) for which an independently elected Will County officer, such as the Will County Sheriff, and its deputies, including Unknown Defendants, acting within the scope of his/her employment, is found liable.

216. The acts and/or omissions of Unknown Defendants and each of them were committed within the scope of their employment.

217. In the event that a judgment for compensatory damages is entered against Unknown Defendants and/or any of them, Will County must pay the judgment as well as the associated attorneys' fees and costs.

COUNT XVI

Plaintiff Against City of Joliet
INDEMNIFICATION

218. Plaintiff hereby incorporates and realleges Paragraphs one (1) through one hundred fifty (150) heretofore as though fully set forth at this place.

219. Pursuant to 745 ILCS 10/9 — 102, 55 ILCS 5/4 — 6003, and 55 ILCS 5/5 — 1106, the City of Joliet is empowered and directed to pay any judgment for compensatory damages (and any associated attorneys' fees and costs) for which an employee police officer, acting within the scope of his/her employment, is found liable.

220. The acts and/or omissions of Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller and each of them were committed within the scope of their employment.

221. In the event that a judgment for compensatory damages is entered against Defendants Gruber, Conroy, Cammack, Bandy, German, Stefanski, Rosado, and Kneller and/or any of them, the City of Joliet must pay the judgment as well as the associated attorneys' fees and costs.

WHEREFORE, the Plaintiff, by and through his attorneys, Stanley B. Eisenhammer, John D. Di John Jr., and Pamela E. Swanson, requests judgment as follows against the Defendants, and each of them:

1. That the Defendants be required to pay Plaintiff's general damages, including emotional distress, in a sum to be ascertained;
2. That the Defendants be required to pay Plaintiff's special damages;
3. That the Defendants other than the City of Joliet be required to pay Plaintiff's attorneys fees pursuant to 42 U.S.C. § 1988, the Equal Access to Justice Act or any other applicable provision;
4. That the Defendants other than the City of Joliet be required to pay punitive and exemplary damages in a sum to be ascertained;
5. That the Defendants be required to pay Plaintiff's costs of the suit herein incurred; and
6. That Plaintiff have such other and further relief as this Court may deem just and proper.

BY: /s/ Stanley B. Eisenhammer
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
Attorney for Plaintiff
3030 Salt Creek Lane, Suite 202
Arlington Heights, IL 60005
847-670-9000
seisenhammer@hlerk.com

PLAINTIFF HEREBY REQUESTS A TRIAL BY JURY

BY: /s/ Stanley B. Eisenhammer
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
Attorney for Plaintiff
3030 Salt Creek Lane, Suite 202
Arlington Heights, IL 60005
847-670-9000
seisenhammer@hlerk.com

JOLIET, ILLINOIS POLICE DEPARTMENT	CONTINUATION/FOLLOW-UP REPORT ◄ CHECK ONE ► [X]	PG # 1	1. C.R. # 11-0318004686	
2. F/FOLLOW-UP DATE OF THIS REPORT: 03/18/11	DATE OF ORIGINAL REPORT: 03/18/11	3. OFFENSE AS VERIFIED: PCS W/ INTENT	4. OFFENSE AFTER INVESTIGATION: N/A	5.CODE: N/A
6. VICTIM'S NAME: STATE OF ILLINOIS	7. LOCATION OF OFFENSE: MILES AND ELMWOOD		8. RELATED O.T.(S): N/A	
9. NARRATIVE - DO NOT REPEAT RESULTS OF PRELIMINARY INVESTIGATION. LIST ADDITIONAL PERSONS OR PROPERTY USING FORMAT OF BOXES 27, 28, OR 48.				

OFFICER T. GRUBER #261 ON 03/18/11 @ 0315 HRS PRIORITY # 1

CRITICAL INFORMATION:

ISSUED TO: FAINT, JEFFERY I., M/B, [redacted]

TICKET #2871629 FAILURE TO SIGNAL 625 ILCS 5/11-804

TICKET #2871630 IMPROPER USE OF REGISTRATION 625 ILCS 5/3-703

ISSUED TO: MANUEL, ELIJAH M/B, [redacted]

TICKET #2871631 FAILURE TO WEAR SEAT BELT 625 ILCS 5/12-603.1

NARRATIVE:

While on patrol, Officer Conroy #271 and I viewed a black Dodge Charger fail to use its turn signal while it was turning EB Elmwood from traveling SB Winston. Officers also ran the registration plates via LEADS resulting the in the license plate registering to a 2005 Pontiac 4dr. A traffic stop was then initiated at Miles and Elmwood. It should be noted upon activating our emergency lights and siren, both officer Conroy and I could see the front seat passenger begin to moving quickly towards the center console. It should be noted he was reaching towards the arm rest area of the vehicle. As I approached the vehicle and I made contact with the passenger A/MANUEL, he acted as if he was sleeping. It was at that time I knocked on the window and he "woke up" startled and began to roll down the window. It was at that time I could smell the scent of burnt cannabis emitting from inside of the vehicle. A/Manuel was then asked to step out of the vehicle at which time

EXHIBIT 1

10. CASE STATUS OF FOLLOW-UP REPORTS				
a. [X] CLEARED BY ARREST / [ ] EXCEPTIONAL CLEARANCE	[ ] WARRANT ISSUED / [ ] UNFOUNDED	[ ] ADMINISTRATIVELY CLOSED / [X] CONTINUE INVESTIGATION BY	[ ] REFER TO OTHER AGENCY	
11. OFFICER ASSIGNED / STAR #	12. SIGNATURE OF REPORTING OFFICER	13. SUPERVISOR AT SCENE		
261, 271, 250, 214	[redacted] 261	[redacted] 03		
14. COPY OF REPORT TO	15. [redacted]	16. DUTY SUPERVISOR		

JOLIET, ILLINOIS POLICE DEPARTMENT	CONTINUATION/FOLLOW UP REPORT ← CHECK ONE → [X]	PG.# 2	I. C.R. # 11-0318004686	
1. IF FOLLOW UP DATE OF THIS REPORT	DATE OF ORIGINAL REPORT	3. OFFENSE AS VERIFIED	4. OFFENSE AFTER INVESTIGATION	5. CODE
03/18/11	03/18/11	PCS W/ INTENT	N/A	N/A
6. VICTIM'S NAME	7. LOCATION OF OFFENSE		8. RELATED O.T.(S)	
STATE OF ILLINOIS	MILES AND ELMWOOD		N/A	

9. NARRATIVE: DO NOT REPEAT RESULTS OF PRELIMINARY INVESTIGATION. LIST ADDITIONAL PERSONS OR PROPERTY USING FORMAT OF BOXES 2, 7, OR 48.

I then began a pat down search. As I was pat searching the left front pocket his sweat pants, I could feel a bulge protruding from his pocket. It was at that time that A/Manuel began to run away from officers. It should be noted he was quickly apprehended a short distance approximately five feet away from the vehicle. He was then placed into custody for obstructing a police officer. A search incidental to arrest revealed a clear plastic bag containing 16 pink pills in the shape of the United States stamped with "USA" on the pills in his left front pant pocket. From my training and experience, I knew the pills to be ecstasy. It should be noted that on the scene the driver of the vehicle, O/Faint was issued two traffic citations. He was then released on scene. The vehicle was then towed by Pen's and A/Manuel was then transported to JPD for booking. It should be noted he was read his lights verbatim via the advise of rights sheet at which time he did understand his rights but he did not wish to waive his rights. The 16 pink suspected ecstasy pills did test positive for ecstasy by Evidence Technician Cammack #285 and did weigh 7.3 grams. They were then entered into Evidence. A Class X felony approval was also given by ASA Walsh.

A/Manuel was then transported to WCADF . TG #291 [redacted]

K. Steele #312 on 03/18/11 @ 0421 hrs

0. CASE STATUS OF FOLLOW-UP REPORTS				
[Y] CLEARED BY ARREST / EXCEPTIONAL CLEARANCE	[ ] WARRANT ISSUED / UNFOUNDED	[ ] ADMINISTRATIVELY CLOSED / CONTINUE INVESTIGATION BY	[ ] REFER TO OTHER AGENCY	
11. OFFICER ASSIGNED / STAR #	12. SIGNATURE OF REPORTING OFFICER		13. SUPERVISOR AT SCENE	
261, 271, 851, 284	[redacted] 261		[redacted] 82	
14. COPY OF REPORT TO	15. FIELD [redacted]	274	16. DUTY SUPERVISOR	

JOLIET, ILLINOIS POLICE DEPARTMENT	CONTINUATION/FOLLOW-UP REPORT ← CHECK ONE → [X]	PG # 1	1. C.R. # 11-031800468	
2. F/U FOLLOW-UP DATE OF THIS REPORT 03/18/11	DATE OF ORIGINAL REPORT 03/18/11	3. OFFENSE AS VERIFIED PCS	4. OFFENSE AFTER INVESTIGATION N/A	I CODE N/A
5. VICTIM'S NAME STATE OF ILLINOIS	7. LOCATION OF OFFENSE ELWOOD AT MILES		8. RELATED D.T.(S) N/A	
9. NARRATIVE - DO NOT REPEAT RESULTS OF PRELIMINARY INVESTIGATION. LIST ADDITIONAL PERSONS OR PROPERTY USING FORMAT OF BOXES 27, 28, OR 49.				

EVIDENCE TECHNICIAN S. CAMMACK #285 ON 03/18/11 @ 0544 HRS PRIORITY # 1

CRITICAL INFORMATION:

NONE

NARRATIVE:

E/T while in the evidence section of the JPD, was met by Officer Gruber #261 and was given a clear plastic baggie which contained numerous pink colored rock like substance individually packaged in clear plastic. E/T weighed the entire package and found it to weigh 7.3 grams. One of the pink rock like substance was tested and found to be to be positive for the probable presence of ecstasy. E/T did then return all the items to Officer Gruber to place into Evidence . SC #285

K. Steele #812 on 03/18/11 @ 0640 hrs

8. CASE STATUS OF FOLLOW-UP REPORTS [ ] CLEARED BY ARREST [ ] EXCEPTIONAL CLEARANCE	[ ] WARRANT ISSUED [ ] UNFOUNDED	[ ] ADMINISTRATIVELY CLOSED [ ] CONTINUE INVESTIGATION BY	[ ] REFER TO OTHER AGENCY	
OFFICER ASSIGNED CAMMACK # 285	STAR #	12. [redacted]	13. SUPERVISOR AT SCENE N/A	
14. COPY OF REPORT TO	15 FIELD SUPERVISOR [redacted]		16. DUTY SUPERVISOR	

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

[Filed 02/07/14]

No. 2011 CF 546

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff,

vs.

ELIJAH MANUEL

Defendant.

GRAND JURY MINUTES

Now come the People of the State of Illinois by JAMES W. GLASGOW, State's Attorney of Will County, Illinois, through Assistant State's Attorney, Erika Sarich, and represents that the following transcripts are those portions of grand jury minutes containing relevant testimony of Officer Gruber, Joliet Police Department, persons whom the State intends to call as a witness at the hearing or trial.

JAMES W. GLASGOW
State's Attorney
Will County, Illinois
Erika Sarich
Erika Sarich
Assistant State's Attorney

[1] IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

[Filed 02/07/14]

No. 2011 CF 546

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

ELIJAH MANUEL,

Defendant.

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the WILL COUNTY GRAND JURY, on the 30th day of March, A.D., 2011, at the Will County Court Annex Building, 57 North Ottawa Street, Joliet, Illinois.

APPEARANCES:

HONORABLE JAMES W. GLASGOW,

WILL COUNTY STATE'S ATTORNEY

BY: MR. MICHAEL CASSON, Assistant State's Attorney

Appeared on behalf of the People of the State of Illinois.

JAMES J. STRAMAGLIA, CSR, RPR
CSR License No. 084-002842
Will County Courthouse
Joliet, IL 60432

[2] (Witness duly sworn.)

(One count Bill of Indictment read to the grand jury.)

TERRENCE GRUBER, called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. CASSON:

Q Officer, please introduce yourself to the grand jury.

A Office T.J. Gruber.

Q Please spell your last name.

A G-r-u-b-e-r.

Q What department are you with, sir?

A Joliet police.

Q Do you have knowledge of this event?

A Yes, I do.

Q Isn't it true that on or about March 18, 2011, police performed a traffic stop on a vehicle at Miles and Elmwood in Joliet for failure to signal a turn and improper use of registration?

A Yes.

Q Police observed the front seat passenger, later identified as the defendant, making furtive movements [3] towards the center console as the officer approached the vehicle?

A Yes.

Q As the officer made contact with the defendant, he pretended to be asleep?

A Yes, he did.

Q The defendant eventually awoke, rolled down the window, at which time the officer immediately detected an odor of burnt cannabis emanating from the vehicle?

A Yes.

Q The defendant exited the vehicle and attempted to flee but was quickly taken into custody?

A Correct.

Q A search of the defendant's person incident to arrest revealed 16 pink pills stamped with the letters U.S.A. in his left pants pocket?

A Correct.

Q The pills field tested positive for methylenedioxymethamphetamine, also known as ecstasy, which was 7.3 grams?

A Correct.

MR. CASSON: Any questions?

(No response.)

[4] (which is all the testimony had in the above-entitled cause this date.)

[5] I hereby certify that I reported stenographically the proceedings had at the hearing in the above-entitled cause, and that the above and foregoing is a true, correct, and complete transcript of my stenographic notes so taken at the time and place hereinbefore set forth.

Date: 4-4-11

[redacted]

JAMES J. STRAMAGLIA, CSR, RPR
Court Reporter, 12th Judicial
Circuit of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed 02/12/14]

Case No. 13 C 3022

ELIJAH MANUEL,

Plaintiff,

v.

CITY OF JOLIET, a municipal corporation, et al.,

Defendants.

MEMORANDUM ORDER

Elijah Manuel ("Manuel"), who originally launched this action with a self-prepared detailed narrative submitted under the heading "Complaint Under the Civil Rights Act, Title 42 Section 1983 U.S. Code," is now represented by able counsel designated by this Court to serve him pro bono publico. Now the First Amended Complaint ("FAC") recently prepared by counsel on Manuel's behalf has been targeted by two Fed. R. Civ. P ("Rule") 12(b)(6) motions to dismiss, and late last week Manuel's counsel filed what they label as "Plaintiff's Modified Response in Opposition to Defendants' 12(b)(6) Motion To Dismiss." Because the parties have met head-on in those submissions, the motions are ripe for decision.

Both Rule 12(b)(6) motions focus primarily on a statute-of-limitations bar, pointing (1) to Section 1983's adoption of the two-year statute of limitations

for Illinois-based personal injury claims and (2) to the fact that Manuel's original pro se Complaint was brought more than two years after the occurrences that constitute the gravamen of Manuel's Section 1983 claims. Because this Court's earlier oral ruling rejected the other contentions advanced by Manuel's counsel, the most recent submission on Manuel's behalf urges denial of the motions only "because plaintiff has a non-time-barred Fourth Amendment or Due Process claim" (Response at 2). And when the Response memorandum gets down to the precise issues, it focuses solely on the contention that the "Plaintiff should have an actionable Section 1983 claim for malicious prosecution through the Fourth Amendment" (*id.* at 4).

On that score Manuel's counsel are totally candid. Their Response at 5 states accurately:

> The Seventh and Eighth Circuits stand alone in deciding that malicious prosecution claims are not actionable as a Fourth Amendment Section 1983 claim. *Newsome v. McCabe,* 256 F. 3d 747, 750 (7th Cir. 2001); *Kurtz v. City of Shrewsbury,* 245 F. 3d 753, 758 (8th Cir. 2001).

As for our Court of Appeals' stance on the subject, the Response goes on to state (also accurately) that the *Newsome* case "holds that Section 1983 malicious prosecution claims are only cognizable as a substantive due process claim if state law does not provide an adequate remedy" – and to close the analytical circle, our Court of Appeals has expressly held that Illinois law *does* provide such a remedy.

What Manuel's counsel must argue then – and they do with vigor – is that *Newsome* should be revisited

and "rejected in the present case." That invitation to a District Judge to override the studied adherence by our Court of Appeals to a position that it knows to be a lonely one (see Judge Richard Posner's recent opinion for the panel in *Julian v. Hanna*, 732 F. 3d 842, 845-46 (7th Cir. 2013)) has put this Court in mind of an even more recent opinion written by Judge Posner that affirmed this Court's decision in a complex case *(Inland Mortgage Capital Corp. v. Chivas Retail Partners*, No. 12-3648, 2014 WL 310355 (7th Cir. Jan. 29)) and concluded in this fashion (*id.* at *3):

> What a topsy-turvy world the defense rightly rejected by the district court would create!

This Court likewise rejects the invitation by Manuel's counsel to create still another topsy-turvy world – if a change from *Newsome* and its progeny is to be made, it must be left to our Court of Appeals to do so.

Accordingly both Rule 12(b)(6) motions are granted. And (1) because the limitations bar erected by Section 1983 cannot be overcome by a nonviable Illinois-based federal malicious prosecution claim and (2) because the most recent response from Manuel's counsel has not suggested any other tenable basis for the survival of his claims, this action is dismissed as well.

/s/ Milton T. Shadur
Milton T. Shadur
Senior United States District Judge

Date: February 12, 2014

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 14-1581

ELIJAH MANUEL,
Plaintiff-Appellant,

v.

CITY OF JOLIET, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 13 C 3022, Milton I. Shadur, *Judge*.

Argued December 16, 2014
Decided December 28, 2015

Before

DIANE P. WOOD, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

ORDER

Elijah Manuel appeals the dismissal of his complaint under 42 U.S.C. § 1983 alleging that the City of Joliet and several of its police officers maliciously prosecuted him when they falsified the results of drug tests and then arrested him for possession with intent to distribute ecstasy. The district court dismissed his claim as foreclosed by *Newsome v. McCabe*, 256 F.3d 747, 750–52 (7th Cir. 2001), because Illinois law already provided an adequate remedy for malicious prosecution. Manuel asks this court to reconsider *Newsome* but offers no compelling reason to do so. We affirm.

Manuel alleged the following in connection with his arrest on March 18, 2011 for possession with intent to distribute ecstasy. On that day he was a passenger in his car being driven by his brother when they were stopped for failing to signal. A police officer detected an odor of burnt cannabis from inside the car. Without warning, the officer flung open the passenger's door and dragged Manuel out. The officer pushed Manuel to the ground, handcuffed him, and then punched and kicked him. The officer then patted down Manuel, and in one pocket found a bottle of pills. The pills were then tested by officers who had arrived at the scene, and these officers falsified the results to show that the pills were ecstasy. Based on these results, Manuel was arrested. In grand jury proceedings on March 31, the police continued to lie about the test results.

But according to a lab report of April 1, 2011, that Manuel submitted with his complaint, the pills were not ecstasy. Yet Manuel was arraigned on April 8, 2011, and not for more than a month—until May 4, 2011—did the Assistant State's Attorney seek dismissal of the charges. Manuel was released the next day. Because of his incarceration, Manuel missed

work and his college classes, forcing him to drop courses he already paid for.

On April 10, 2013, Manuel sued the City of Joliet and various City of Joliet police officers alleging malicious prosecution because of the falsified drug tests and other civil rights claims that stemmed from his arrest (unreasonable search and seizure, excessive force, violation of due process rights, conspiracy to deprive constitutional rights, unreasonable detention, failure to intervene, and denial of equal protection of laws).

The court dismissed most of the § 1983 claims as time-barred because they fell outside the two-year statute of limitations. As for the malicious-prosecution claim—which was not time-barred because the statute of limitations did not begin tolling until May 4, 2011, when the underlying proceedings were terminated in Manuel's favor—the court treated it as barred under *Newsome* because Illinois law provided an adequate remedy.

On appeal Manuel challenges only the dismissal of his malicious-prosecution claim and argues that the claim, as one in which the police misrepresented evidence, fits into an area of law that *Newsome* did not foreclose. He invokes *Johnson v. Saville*, 576 F.3d 656, 663 (7th Cir. 2009), in which we stated that "*Newsome* left open the possibility of a Fourth Amendment claim against officers who misrepresent evidence to prosecutors."

Newsome held that federal claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment, and thus there is no malicious prosecution claim under federal law if, as here, state law provides a similar cause of action.

Newsome, 256 F.3d at 750–51; *see Julian v. Hanna*, 732 F.3d 842, 845–46 (7th Cir. 2013). *Newsome* did not preclude Fourth Amendment claims generally, but we have cautioned that "there is nothing but confusion gained by calling [a] legal theory [brought under the Fourth or any other amendment] 'malicious prosecution.'" *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) (quoting *Newsome*, 256 F.3d at 751) (internal quotation omitted); *see also McCullach v. Gadert*, 344 F.3d 655, 659 (7th Cir. 2003) (recognizing a Fourth Amendment wrongful-arrest claim against an officer who allegedly gave false information in an incident report and at a preliminary hearing). As the district court noted, any Fourth Amendment claim that Manuel might bring is time-barred. Fourth Amendment claims are typically "limited up to the point of arraignment," after which it becomes a malicious prosecution claim. *Bielanski v. County of Kane*, 550 F.3d 632, 638 (7th Cir. 2008). Thus if Manuel has a Fourth Amendment claim not barred by *Newsome*, it would have stemmed from his arrest on March 18, 2011, which he would have had to challenge within two years, *see* 735 ILCS 5/13-202, but he did not sue until April 10, 2013. And in any event, Manuel has no Fourth Amendment right to be free from groundless prosecution. *Bielanski*, 550 F.3d at 638; *Ray v. City of Chicago*, 629 F.3d 660, 664 (7th Cir. 2011).

Next Manuel argues that we should reconsider our holding in *Newsome* and recognize a federal claim for malicious prosecution under the Fourth Amendment regardless of the available state remedy. By his count, ten other circuits have recognized federal malicious-prosecution claims under the Fourth Amendment—assuming that the plaintiff has been seized in the course of the malicious prosecution. *See Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (collecting

cases); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 98–99 (1st Cir. 2013) ("there is now broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period.")

Manuel does not provide a compelling reason to overrule our precedent. *See United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. 2010) (setting forth standard for overturning circuit precedent); *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010). As we stated in our most recent endorsement of *Newsome's* rationale: "When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." *Llovet*, 761 F.3d at 764. While Manuel's counsel advanced a strong argument, given the position we have consistently taken in upholding *Newsome*, *see Llovet v. City of Chicago*, 761 F.3d 759, 760 (7th Cir. 2014); *Ray*, 629 F.3d at 664; *Parish*, 594 F.3d at 554, Manuel's argument is better left for the Supreme Court.

Manuel tries to distinguish *Llovet* on grounds that he was arrested without probable cause and incarcerated for seven weeks. Although *Llovet* is largely about the theory of "continuing seizures" and thus distinguishable from Manuel's facts, we said in that case that "once detention by reason of arrest turns into detention by reason of arraignment...the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process." 761 F.3d at 763. Only if state law fails to provide an adequate remedy can a plaintiff pursue a federal due process claim for malicious prosecution, *id.* at 764; *cf. Julian*, 732 F.3d at 846 (Indiana did not have an

adequate remedy for malicious-prosecution claim), and Illinois has an adequate remedy. *Ray*, 629 F.3d at 664.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60609

No. 14-1581

ELIJAH MANUEL,
Plaintiff-Appellant,

v.

CITY OF JOLIET, *et al.*,
Defendants-Appellees.

Originating Case Information:
District Court No: 1:13-cv-03022
Northern District of Illinois, Eastern Division
District Judge Milton I. Shadur

January 28, 2015

Before: DIANE P. WOOD, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

FINAL JUDGMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

No. 14-9496

IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

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BRIEF FOR PETITIONER

Petitioner Elijah Manuel respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 100) is unpublished but can be found at 590 Fed. Appx. 641. The opinion of the District Court for the Northern District of Illinois (J.A. 97) is unpublished but can be found at 2014 WL 551626.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2015. Petitioner filed a timely petition for a writ of certiorari on April 27, 2015, which this Court granted on January 15, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . subjects, or causes to be subjected, any citizen of the United States or other person within

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

STATEMENT OF THE CASE

Police officers from the City of Joliet arrested petitioner Elijah Manuel and caused him to be detained for forty-eight days in county jail, all the while knowing there was no probable cause—indeed, no basis whatsoever—to believe he had committed any crime. This case concerns whether the Fourth Amendment supplies Manuel a cause of action under 42 U.S.C. § 1983 based on the weeks of that detention that followed the officers' misrepresentations to a judicial officer that he had committed a felony.

A. Factual Background[1]

Shortly after midnight on March 18, 2011, petitioner Elijah Manuel and his brother were driving in Manuel's car through Joliet, Illinois. Manuel was asleep in the passenger seat while his brother was driving. J.A. 30, 101.

After allegedly observing Manuel's car fail to signal a turn, Joliet police officers Terrence Gruber and Thomas Conroy, who had a history of harassing the brothers, pulled the car over. J.A. 73, 101. The

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[1] Because this case comes to the Court on appeal from a decision granting a motion to dismiss, this Court "must accept as true all the factual allegations in the complaint." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

officers approached the car and, without warning, opened the passenger door, forced Manuel from the car, and thrust him face-first to the ground. *Id.* 101.[2] Officer Gruber handcuffed Manuel and taunted him: "You remember me, street punk? Now I got you, you fucking nigger." *Id.* 32, 63. As Manuel remained handcuffed on the ground, Officers Gruber and Conroy punched and kicked him. *Id.* 32, 101. At some point, at least three other officers arrived on the scene. *Id.* 64-69. They stood by and watched Officers Gruber and Conroy beat Manuel until he suffered a black eye, facial abrasions, and other injuries that caused intense pain and soreness that persisted for weeks. *Id.* 32.

The officers also searched Manuel. They found nothing except a vitamin bottle in his pocket with pills inside. The officers conducted a field test on the pills for the presence of a controlled substance. J.A. 101. The pills tested negative, and Manuel protested his innocence of any wrongdoing. *Id.* 28-29, 101. Nevertheless, the officers arrested Manuel and brought him to the police station. *Id.* 101.

At the station, a law enforcement evidence technician tested the pills again. The result again came back negative; there was no controlled substance. J.A. 34, 50. The technician, however, lied in his report, stating that one of the pills was "found

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[2] The officers would later claim that as they approached the car, they saw someone inside move toward the center console. J.A. 95. They added that they smelled "the odor of burnt cannabis." *Id.* 101. But even though they later tore apart Manuel's car, *id.* 36, and thoroughly searched him, they never produced any evidence of marijuana, *id.* 30.

to be positive for the probable presence of ecstasy." *Id.* 92.

Later that morning, another officer who had been at the scene of the arrest executed a criminal complaint on oath in the county court of Will County, Illinois. J.A. 52-53. Based on the police technician's report, as well as Officer Gruber's arrest report claiming that "[f]rom [his] training and experience, [he] knew the pills to be ecstasy," *id.* 91, the complaint charged Manuel with felony possession of a controlled substance, *id.* 52.

In Will County, persons arrested without a warrant and charged with state law offenses are typically brought before a county court judge within forty-eight hours. Office of Will County Public Defender, *The Court Process*, http://bit.ly/1U7TFjq (last visited May 1, 2016). The court typically appoints counsel at this "first appearance." *Id.* As the Fourth Amendment requires, the judge also "determine[s], based upon the synopsis of the police report, if there was sufficient probable cause for an arrest." *Id.*; *see Gerstein v. Pugh*, 420 U.S. 103 (1975). Defense counsel may dispute whether the allegations in the report, on their face, rise to the level of probable cause. But counsel may not challenge the truth of any of the allegations or otherwise try to dispute them.

Consistent with these protocols, the state-court docket sheet (not yet part of the record in this case) shows that on the day of his arrest, Manuel appeared

before a judge on the drug charge.[3] The court accepted and recited the charge and appointed a public defender to represent Manuel. Defense counsel acknowledged receipt of the complaint and waived the opportunity to dispute that the officers had supplied allegations to the court that, on their face, satisfied *Gerstein*'s probable cause requirement. The court then set bond and remanded Manuel to the county jail.

About two weeks later, in a proceeding that lasted only a few minutes, a Will County prosecutor presented the charges to a grand jury. J.A. 95-96. Officer Gruber repeated his allegation from the police report that the pills he seized from Manuel had tested positive in the field for ecstasy. *Id.* Solely on the basis of Gruber's false statement, the grand jury indicted Manuel. *Id.* 54-55.

On April 1, 2011, an Illinois State Police Laboratory test confirmed that the pills were neither ecstasy nor any other controlled substance. J.A. 51. There is no indication in the documents Manuel has thus far obtained that the Joliet police disclosed this report to the prosecutor or anyone else.

One week later, Manuel was arraigned on the basis of the grand jury indictment. Apparently still unaware of the lab report confirming that the pills contained no controlled substance, the prosecution

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[3] This docket sheet is publicly available and can be found at the Will County Circuit Court website by searching for case number 11CF00546 and selecting the "Events" tab, available at https://ipublic.il12th.org/SearchPrompt.php (last visited May 1, 2016).

did not mention it. So Manuel languished in county jail for almost another month. J.A. 101.

Finally, after receiving a request from Manuel's public defender to turn over a copy of any test results regarding the pills, the prosecution obtained the state lab report and moved to dismiss the charges. J.A. 34, 101. The county court accepted the State's motion and dismissed the charges. *Id.* Manuel was released the next day, May 5, 2011—forty-seven days after his first court appearance. *Id.*

During and after his detention, Manuel suffered extreme emotional distress, depression, and the anxiety that arises from any long-term incarceration. J.A. 38, 42. He could neither work nor complete his college coursework, but he still owed tuition for the classes he had missed. *Id.* 101-02. With no income, he had to default on his student loan debt and other bills, ultimately losing his apartment and incurring damage to his credit score and reputation. *Id.* 36.

B. Procedural and Legal Background

On April 22, 2013, Manuel filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois. J.A. 25-47 Manuel sued eight named officers and additional unknown officers involved in his arrest and detention. He also named the City of Joliet as a defendant, alleging that the officers' unlawful actions were part of a municipal pattern and practice. He alleged multiple constitutional violations, including the claim at issue here: a "malicious prosecution" claim arising from his prolonged detention after the police falsely represented to the county court judge that there was

probable cause to believe that Manuel had committed a crime. *Id.* 37-39.

1. By way of brief background, malicious prosecution claims permit damages for confinement pursuant to wrongful institution of "legal process"—that is, the process by which law enforcement represents in a legal proceeding that probable cause exists to believe someone has committed a crime. *Wallace v. Kato*, 549 U.S. 384, 390 (2007); *accord Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Such claims are "entirely distinct" from any claims for illegal warrantless arrest, which are limited to the period *before* an arrestee is held pursuant to legal process. *Wallace*, 549 U.S. at 389-90.

For centuries before the Founding, the common-law version of the malicious prosecution tort provided an action against any "complaining witnesses" who falsely and maliciously made accusations to a magistrate, judge, or law enforcement officer. *Kalina v. Fletcher*, 522 U.S. 118, 132-34 (1997) (Scalia, J., concurring); *see generally* Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1441-42 (1989) (describing early history of common-law malicious prosecution tort). American courts in the early Republic likewise recognized malicious prosecution tort claims. *See, e.g.*, *Moody v. Pender*, 3 N.C. (2 Hayw.) 29 (1798); *see also Briscoe v. LaHue*, 460 U.S. 325, 351 n.9 (1983) (Marshall, J., dissenting) (collecting cases).

In modern times, complaining witnesses in criminal cases are commonly police officers or other state actors. Accordingly, malicious prosecution claims are now often brought under 42 U.S.C. § 1983, which provides individuals a cause of action against

state and local government officials who deprive them of "any rights, privileges, or immunities secured by the Constitution and laws."

In *Albright v. Oliver*, 510 U.S. 266 (1994), seven Justices explained in various opinions that when someone who has been detained without probable cause brings a malicious prosecution claim, the Fourth Amendment provides a basis for the claim. *See id.* at 271 (plurality opinion); *id.* at 290 (Souter, J., concurring in the judgment); *id.* at 307-08 (Stevens, J., joined by Blackmun, J., dissenting). Justice Kennedy, joined by Justice Thomas, wrote separately to explore the viability of Albright's claim as a matter of procedural due process, but they did not disagree that the Fourth Amendment could also have applied. *Id.* at 281 (opinion concurring in the judgment). Consequently, ten federal courts of appeals have held that the Fourth Amendment provides a legitimate constitutional basis under these circumstances for malicious prosecution claims.[4]

2. After reviewing Manuel's *pro se* complaint, the district court appointed counsel, who filed an

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[4] *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013); *Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998); *Lambert v. Williams*, 223 F.3d 257, 261-62 (4th Cir. 2000); *Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003); *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126-27 (9th Cir. 2002); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257-58 (10th Cir. 2007); *Whiting v. Traylor*, 85 F.3d 581, 583-84 (11th Cir. 1996); *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007).

amended complaint. Like the original complaint, the amended complaint advanced numerous civil rights claims, including a malicious prosecution claim under Section 1983 based on the violation of Manuel's Fourth Amendment rights. J.A. 79, 102.

Respondents filed a motion to dismiss, arguing that all of Manuel's claims were time-barred under the applicable two-year limitations period. According to respondents, all of Manuel's claims accrued on the day of his arrest, which was more than two years before he filed his complaint. J.A. 97-98. The district court agreed, except with respect to his malicious prosecution claim. Malicious prosecution claims accrue when "criminal proceedings have terminated in the plaintiff's favor." *Heck*, 512 U.S. at 489; *see also Albright*, 510 U.S. at 280 (Ginsburg, J., concurring) (Fourth Amendment malicious prosecution claim accrues "upon dismissal of the criminal charges" against the detainee). Manuel had filed his complaint within two years of the dismissal of the drug charge, so his malicious prosecution claim was timely. J.A. 98.

The district court nevertheless dismissed Manuel's malicious prosecution claim. Even though the claim would have been valid in the vast majority of circuits, the district court deemed itself bound by Seventh Circuit precedent dictating that malicious prosecution claims may never be brought under the Fourth Amendment. J.A. 99.

3. Manuel appealed the dismissal of his malicious prosecution claim to the Seventh Circuit, contending that his claim was cognizable under the Fourth Amendment.

Like the district court, the Seventh Circuit panel deemed itself bound by circuit precedent to disagree. Under circuit law derived from an interpretation of Justice Kennedy's concurrence in *Albright*, the panel explained, claims of malicious prosecution alleging improper detention following the commencement of legal process "are founded on the right to due process, not the Fourth Amendment." J.A. 102. And circuit law, the panel continued, forecloses such procedural due process claims "if, as here, state law provides a similar cause of action." *Id.*

The court of appeals conceded that "there is now broad consensus among the circuits that the Fourth Amendment right to be free from unreasonable seizure but upon probable cause extends through the pretrial period" and thus supports claims for malicious prosecution. J.A. 104 (quoting *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 98-99 (1st Cir. 2013)). The court of appeals further acknowledged that "Manuel's counsel advanced a strong argument" for joining those circuits. *Id.* 104. Yet in light of the contrary Seventh Circuit precedent, the panel concluded that "Manuel's argument [was] better left for the Supreme Court." *Id.* (citing *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001); *Llovet v. City of Chicago*, 761 F.3d 759 (7th Cir. 2014)).

4. This Court granted certiorari. 136 S. Ct. 890 (2016).

SUMMARY OF ARGUMENT

Malicious prosecution claims for pretrial detention without probable cause after the initiation of legal process may be brought under the Fourth Amendment.

I. Time and again, this Court has held that the Fourth Amendment governs the detention of suspects pending trial. Accordingly, *Albright v. Oliver*, 510 U.S. 266 (1994), instructs that malicious prosecution claims arising from wrongful pretrial detention should be analyzed under the Fourth Amendment.

Such analysis reveals that the Fourth Amendment prohibits pretrial detention pursuant to legal process initiated without probable cause. When law enforcement officers initiate legal process by seeking an arrest warrant, they violate the Fourth Amendment if they cause someone to be detained without probable cause. *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). The procedures and perils in probable cause determinations that, as here, follow warrantless arrests are "the same" as in the pre-arrest setting. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). Consequently, law enforcement officers also violate the Fourth Amendment when they cause someone to be detained without probable cause pursuant to an initiation of legal process that occurs after arrest. Indeed, holding that the Fourth Amendment applies only when legal process *precedes* arrest would invert this Court's established preference for pre-arrest probable cause determinations by incentivizing officers to conduct warrantless arrests.

II. The Due Process Clause is irrelevant to Manuel's malicious prosecution claim. This Court need not choose among potential constitutional sources of the claim, as "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992).

But if this Court needs to decide whether the Fourth Amendment or Due Process Clause trumps here, the Fourth Amendment must prevail. In *Albright*, seven Justices (five of whom agreed in the judgment) concluded that malicious prosecution claims arising from unlawful pretrial detentions should be judged under the Fourth Amendment. Justices Kennedy and Thomas did not undercut that proposition. Rather, these Justices merely contended that even where people are seized, they should also be able to base malicious prosecution claims upon "interests other than the interest in freedom from physical restraint." *Albright*, 510 U.S. at 283 (Kennedy, J., concurring in the judgment).

Requiring claims like Manuel's to be cast as due process claims would also raise administrative uncertainties. Procedural due process turns on flexible, generalized standards that dictate no predictable outcomes. For that reason, this Court in *Gerstein* rejected importing the requirements of procedural due process into "the detention of suspects pending trial." 420 U.S. at 125 n.27. In the particular context of malicious prosecution claims as well, it is far easier for courts to follow the Fourth Amendment's settled requirements.

III. Because Manuel has alleged a violation of his Fourth Amendment rights, he can bring his claim under Section 1983. The availability of a state law remedy is irrelevant when a Section 1983 claim is anchored in the Fourth Amendment. Furthermore, allowing claims such as Manuel's comports with the common law and vindicates the core purposes of Section 1983—compensating victims of constitutional torts and deterring constitutional violations.

ARGUMENT

I. The Fourth Amendment Governs Malicious Prosecution Claims Involving Pretrial Detentions Without Probable Cause

Manuel alleges that he suffered "unlawful detention" arising from the "wrongful institution of legal process." *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (emphasis omitted). In particular, Manuel claims that respondent police officers initiated criminal proceedings against him, resulting in his prolonged detention, even though they knew they lacked probable cause to believe that he had committed a crime.

While this Court and others have referred to claims like Manuel's as "malicious prosecution," *Wallace*, 549 U.S. at 390, some courts have suggested that "a better name" for such a claim "might be unreasonable prosecutorial seizure." *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010) (internal quotation marks and citation omitted); *see also Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) ("malicious prosecution" label invites unnecessary confusion). After all, the gravamen of the claim is unlawful detention, not the mere filing of baseless charges. Regardless of terminology, this claim (A) should be analyzed under the Fourth Amendment and (B) alleges a violation of that constitutional guarantee.

A. Claims Grounded in Pretrial Detention Without Probable Cause Should Be Analyzed Under the Fourth Amendment

Over forty years ago, this Court instructed that the Fourth Amendment supplies the basis for analyzing allegedly unconstitutional "detention[s] of suspects pending trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). Ever since, this Court has consistently reaffirmed that the "detention of criminal suspects" is "governed by the provisions of the Fourth Amendment." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993); *see also Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.").

In fact, this Court in *Albright* deemed the Fourth Amendment to be the proper constitutional footing for analyzing a malicious prosecution claim. In that case, plaintiff Albright was arrested pursuant to a warrant on suspicion of selling a substance that looked like an illegal drug. After posting bond, Albright was released on the condition that he not leave the state without permission. The trial court eventually dismissed the charges against him "on the ground that the charge did not state an offense under Illinois law." *Albright*, 510 U.S. at 268-69 (plurality opinion).

Albright sued the arresting officer and others under Section 1983. Because he was never incarcerated, "Albright may have feared that courts would narrowly define the Fourth Amendment's key term 'seizure' so as to deny full scope to his claim."

Albright, 510 U.S. at 277 (Ginsburg, J., concurring). So instead of invoking the Fourth Amendment, Albright alleged that the police violated his substantive due process rights by initiating a criminal prosecution against him without probable cause to believe he had committed any crime. *Id.* at 268-69 (plurality opinion).

The defendants did "not argue that the Civil Rights Act fail[ed] to provide a remedy for the conduct complained of." Resp. Br. 9, *Albright v. Oliver*, 510 U.S. 266 (1994) (No. 92-833). Indeed, they suggested that Albright had a "plausible fourth amendment claim based upon an unreasonable seizure" arising out of his arrest pursuant to legal process, such that Albright should have grounded his claim on that basis. *Id.* 9, 13. What Albright could not do, the defendants argued, was bring a substantive due process claim grounded in "the less tangible impact on liberty" associated with the mere "filing of charges." *Id.* 5-8, 13.

In a splintered decision, the Court agreed with the defendants, holding that Albright could not bring his claim under the rubric of substantive due process. *Albright*, 510 U.S. at 271 (plurality opinion); *id.* at 281, 283 (Kennedy, J., concurring in the judgment); *id.* at 286 (Souter, J., concurring in the judgment). And although Albright had not separately advanced a Fourth Amendment violation, seven Justices (five of whom agreed with the judgment) concluded that the Fourth Amendment provided a proper basis for analyzing malicious prosecution claims involving "pretrial deprivations of liberty." *Id.* at 274 (plurality opinion); *see also id.* at 290 (Souter, J., concurring in the judgment); *id.* at 307 (Stevens, J., joined by

Blackmun, J., dissenting). Indeed, because Albright was unquestionably "seized" when he surrendered to the arrest warrant and the Fourth Amendment regulates "restraint[s] on liberty following an arrest," the plurality explained, "it [was] the Fourth Amendment . . under which petitioner Albright's claim *must* be judged." *Id.* at 271 (emphasis added).

Consistent with this directive, we now apply Fourth Amendment principles to Manuel's claim.

B. The Fourth Amendment Prohibits Pretrial Detention Without Probable Cause After Legal Process Has Commenced

To justify any "extended" detention related to potential or actual criminal charges, the Fourth Amendment requires law enforcement to demonstrate to a judicial officer that probable cause exists to believe the suspect committed a crime. *Gerstein*, 420 U.S. at 114. This demonstration may occur before or after arrest. *Id.* Either way, law enforcement officers violate the Fourth Amendment's prohibition against unreasonable seizures when their overzealousness or mendacity causes someone to be detained without probable cause.

1. Law enforcement officers can satisfy the Fourth Amendment's probable cause requirement for extended pretrial detention in one of two ways.

First, officers may secure an arrest warrant before arresting a suspect. In this setting, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the

requirements of the Fourth Amendment." *United States v. Leon*, 468 U.S. 897, 921 (1984).

Second, law enforcement officers sometimes need to arrest someone without first seeking a warrant. In this scenario, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime." *Gerstein*, 420 U.S. at 113-14. But if that detention is to continue for longer than forty-eight hours, the Fourth Amendment requires law enforcement to secure a "judicial determination" of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *see also Gerstein*, 420 U.S. at 125 (post-arrest determinations of probable cause must occur "promptly after arrest").

Regardless of whether demonstrating probable cause to a judicial officer occurs before or after arrest, the demonstration constitutes legal process. *See Wallace*, 549 U.S. at 389 (referring to an arrest warrant as "legal process"); *id.* (legal process commences when suspect "is bound over by a magistrate"); *see also Burns v. Reed*, 500 U.S. 478, 492 (1991) (probable cause hearing is part of "the judicial phase of the criminal process" (citation omitted)).

2. When legal process occurs before an arrest, police officers violate the Fourth Amendment if they cause someone to suffer pretrial detention without probable cause. For example, this Court has long held that if a police officer obtains a warrant based on "a false statement, [made] knowingly and intentionally, or with reckless disregard for the truth," the execution of that warrant violates the Fourth Amendment. *Franks v. Delaware*, 438 U.S.

154, 155-56 (1978); *see also Herring v. United States*, 555 U.S. 135, 145 (2009) (confirming this rule applies in the context of arrest warrants).

Malley v. Briggs, 475 U.S. 335 (1986), is particularly on point. There, a police officer submitted affidavits and a judge issued arrest warrants for the plaintiffs on drug charges. *Id.* at 338. Police arrested the plaintiffs, but the charges were later dismissed as unfounded. *Id.* When the plaintiffs filed a Section 1983 suit claiming that their post-arrest pretrial detention in the absence of probable cause violated the Fourth Amendment, the arresting officer responded that the detention was *per se* reasonable because "he [wa]s entitled to rely on the judgment of a judicial officer in finding that probable cause exist[ed]." *Id.* at 345. This Court disagreed, and held that an officer may be held liable under Section 1983 when it is "obvious that no reasonably competent officer would have concluded that a warrant should issue." *Id.* at 341, 345.

This Court in *Malley* focused principally on the circumstances under which police officers are entitled to immunity. But "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court is] bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). And in holding that the officer in *Malley* was not necessarily entitled to immunity, this Court also ruled that the plaintiffs' allegations, if true, stated a Fourth Amendment violation. In particular, drawing on Fourth Amendment principles, this Court held that an officer should be held liable if "a reasonably well-trained officer . . . would have known that his affidavit failed

to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345.

Malley, in other words, announced not only a qualified immunity principle but a Fourth Amendment rule as well: The Fourth Amendment is violated when someone is detained pursuant to an arrest warrant issued on less than probable cause. Thus, as Justice Scalia later explained, *Malley* enables "malicious prosecution" claims to be brought against officers who cause illegal detentions pursuant to arrest warrants not supported by probable cause. *Kalina v. Fletcher*, 522 U.S. 118, 133-34 (1997) (Scalia, J., concurring). If the officers here had secured an arrest warrant for Manuel based on the same representations they made after arresting him, Manuel's subsequent detention until charges were dropped would undoubtedly have violated the Fourth Amendment.

Holding officers answerable to the Fourth Amendment when they wrongfully obtain and execute an arrest warrant makes perfect sense. Warrant applications are conducted on an *ex parte* basis. "The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations." *Franks*, 438 U.S. at 169. Moreover, given severe "docket pressures," *Malley*, 475 U.S. at 346, magistrates are rarely able "to make an extended independent examination of the [police officer] affiant or other witnesses," *Franks*, 438 U.S. at 169. Magistrates thus have no choice but to depend on the care, veracity, and integrity of police officers. *Id.* at 169-70. If an officer's conduct falls short and probable

cause is lacking, the detention violates the Fourth Amendment. It does not matter that the magistrate accepted the warrant application.

3. When, as here, legal process occurs after an arrest, the Fourth Amendment is likewise violated if officers cause someone to suffer pretrial detention without probable cause.

In *Gerstein*, this Court explained that the procedures required for a post-arrest demonstration of probable cause are "the same" as those required for the issuance of an arrest warrant. *Gerstein*, 420 U.S. at 120; *see also id.* at 120 n.21 ("the standards are identical"). Just like warrant application proceedings, so-called *Gerstein* hearings need not provide significant procedural or "adversary safeguards" to the accused. *Id.* at 120. For instance, this case comes from Will County, Illinois, where a magistrate judge at a *Gerstein* hearing determines probable cause "based upon the synopsis of the police report." Office of Will County Public Defender, *The Court Process*, http://bit.ly/1U7TFjq (last visited May 1, 2016). Just as when law enforcement officers apply for an arrest warrant, the defendant has no opportunity to rebut police officers' allegations in support of probable cause. *Id.*[5]

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[5] In many other jurisdictions, the procedural requirements for *Gerstein* hearings are similarly minimal. For example, in New Mexico, "[t]he determination that there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel." N.M. Dist. Ct. R. Crim. P. 5-301. In Florida, "the Fourth Amendment requirement [is] satisfied by an informal nonadversarial judicial determination of probable cause. The defendant need not be provided counsel for

In light of this equivalence, judicial officers at *Gerstein* hearings are similarly dependent on—and detainees are equally at the mercy of—law enforcement officers as in the pre-arrest setting. Where, as here, officers mislead magistrates to sustain detentions without probable cause, the detentions thus violate the Fourth Amendment just as surely as when misrepresentations cause detentions under an unfounded arrest warrant. Put another way, a post-arrest initiation of legal process no more renders a detention without probable cause automatically reasonable than does a pre-arrest initiation of legal process.

Notwithstanding this analysis, the Seventh Circuit has suggested without citation that "once detention by reason of arrest turns into detention by reason of" a *Gerstein* hearing, the Fourth Amendment "falls out of the picture." *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014). According to the Seventh Circuit, continuing to detain someone in jail following a judicial determination of probable cause is not a "seizure." *Id.*

To the extent the Seventh Circuit maintains that once some period of time elapses, pretrial incarceration following an arrest ceases to be a "seizure," this contention cannot be correct. It is well-established that a person is seized whenever "his freedom of movement is restrained" such that he feels

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purposes of the postarrest determination of probable cause. Indeed, the defendant need not even be present." 22 Fla. Prac., *Criminal Practice & Procedure* § 9:6 (2016).

"not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980).[6] Therefore, anyone who is arrested and put in jail is seized from arrest until release; the Seventh Circuit is just wrong to claim there is a difference in this context "between seizing a person and not letting him go," *Llovet*, 761 F.3d at 764.

Indeed, if detention in county jail at some point ceased to be a "seizure," the perverse result would be that whenever the state held a criminal suspect in custody for long enough, the Fourth Amendment would eventually cease to govern the detention. But *Gerstein* and *McLaughlin* hold the opposite: the longer the state detains someone without a hearing, the more likely the Fourth Amendment is violated. *McLaughlin*, 500 U.S. at 57; *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (Fourth Amendment prohibits continued detention of motorists at traffic stops after the traffic matter has been resolved).

To the extent the Seventh Circuit maintains instead that a detention ceases to be a seizure once a magistrate condones it, *see Llovet*, 761 F.3d at 763, that cannot be right either. A post-arrest demonstration of probable cause enables the *continuation* of the seizure, not its *termination*. That is, a probable cause finding does not change the fact that a suspect's freedom of movement remains

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[6] Only four Justices signed the lead opinion in *Mendenhall*, but "[t]he Court has since embraced this test." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

restrained and he is still "not free to leave," *Mendenhall*, 446 U.S. at 554.[7]

To be sure, in some cases a person's continued unreasonable seizure may be attributable to a magistrate's error, rather than to wrongdoing by any law enforcement officer. In those cases, the law enforcement officer might not be the appropriate defendant, *see Wallace*, 549 U.S. at 391, and the magistrate is likely absolutely immune from Section 1983 liability, *see Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam) (describing rule of absolute immunity for judicial actions). But the question of who the proper defendant might be in any given case is one of causation; it has nothing to do with whether the Fourth Amendment is violated. *See Malley*, 475 U.S. at 344 n.7.

In any event, there is no such causation difficulty here. When an officer's role in "effectuating and maintaining a seizure" at the probable cause hearing causes a person's continued detention, the officer may be found liable under the Fourth Amendment. *Albright*, 510 U.S. at 279 & n.5 (Ginsburg, J., concurring); *see also Monroe v. Pape*, 365 U.S. 167,

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[7] The common law—from which Fourth Amendment "standards and procedures" are "derived," *Gerstein*, 420 U.S. at 111—reinforces the conclusion that legal process does not terminate a seizure. *See Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 347-49 (1870) (explaining that a court's issuance of a warrant affirming the validity of a prior warrantless seizure of property under Confiscation Acts would not terminate the seizure); *see also California v. Hodari D.*, 499 U.S. 621, 624 (1991) (looking to case law under Confiscation Acts to determine the meaning of "seizure" under the Fourth Amendment).

187 (1961) (Section 1983 should be implemented according to "the background of tort liability that makes a man responsible for the natural consequences of his actions."). Because the officers here provided "misleading" representations to support Manuel's detention, *see supra* at 4-5, that causation standard is easily met. *See Albright*, 510 U.S. at 279 (Ginsburg, J., concurring).[8]

4. Suspending the Fourth Amendment when legal process follows—but not when it precedes—an arrest would contravene this Court's well-established preference for pre-seizure assessments of probable cause. As noted earlier, circumstances sometimes require officers to make probable cause determinations in the field. But police officers in this situation may be overzealous in their judgments of what constitutes probable cause because they are "engaged in the often competitive enterprise of ferreting out crime." *Gerstein*, 420 U.S. at 113 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). So "whenever possible," this Court requires

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[8] The same causation analysis applies to grand jury probable cause determinations, as occurred about midway through Manuel's detention. Like a *Gerstein* hearing, "[a] grand jury proceeding is not an adversary hearing Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Accordingly, "[t]he intervening acts of a grand jury have never been enough" under the common law or the Fourth Amendment "to defeat an otherwise viable malicious prosecution claim" grounded in an officer's misrepresentations while initiating the prosecution. *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988).

that "the existence of probable cause be decided by a neutral and detached magistrate" *before* any arrest occurs. *Id.* at 112; *see also Malley*, 475 U.S. at 353 (Powell, J., concurring in part and dissenting in part) ("The police, where they have reason to believe probable cause exists, should be encouraged to submit affidavits to judicial officers" to obtain warrants.).

Attaching the Fourth Amendment to pre-arrest probable cause determinations but not post-arrest probable cause determinations would invert this preferred structure. It would mean that officers could escape responsibility for causing unjustified seizures after warrantless arrests, while they would face liability for unjustified seizures pursuant to arrest warrants. This would perversely incentivize law enforcement officials to pursue warrantless arrests, rather than warrants, whenever possible.

Holding that the Fourth Amendment falls away immediately upon post-arrest probable cause demonstrations would also thwart the purpose of *Gerstein*. The whole point of that decision is to give people arrested without warrants the same basic "protection against unfounded invasions of liberty and privacy" that the Fourth Amendment extends to those arrested with warrants. *Gerstein*, 420 U.S. at 112. When people are arrested without warrants and then incarcerated for an extended period without probable cause, it is just as "essential" that the Fourth Amendment provide protection as when such detentions occur pursuant to warrants. *Id.* at 114.

II. The Due Process Clause Is Irrelevant to Manuel's Malicious Prosecution Claim

Despite the Fourth Amendment's straightforward application here, the Seventh Circuit has reasoned—contrary to every other circuit to consider the question—that "once detention by reason of arrest turns into detention by reason of [legal process], . . . the detainee's claim that the detention is improper becomes [exclusively] a claim of malicious prosecution violative of due process." J.A. 104 (quoting *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014)). This reasoning is mistaken.

1. "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). When this happens, "applicability of one constitutional amendment" does not "pre-empt[] the guarantees of another." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993). Consequently, it is immaterial whether Manuel could have framed his malicious prosecution claim as a violation of procedural due process. He has invoked the Fourth Amendment, and the Fourth Amendment supports his cause of action.

2. If for some reason it were necessary to undertake a "pigeonhole analysis," *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)—that is, to force Manuel's claim into a single constitutional provision—it would be improper to require the claim to be grounded in the Due Process Clause instead of the Fourth Amendment.

a. In *Albright v. Oliver*, 510 U.S. 266 (1994), seven Members of the Court (five of whom agreed with the judgment) endorsed the Fourth Amendment

as a basis for analyzing malicious prosecution claims. *See supra* at 8.

The Seventh Circuit has ignored those seven votes and instead focused exclusively on Justice Kennedy's opinion concurring in the judgment, in which Justice Thomas joined. *See Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001). Justice Kennedy would have held that malicious prosecution claims like Albright's—claims grounded solely in the interest in avoiding criminal charges—could sometimes proceed in federal court as procedural due process claims. *Albright*, 510 U.S. at 283-84.

Contrary to what the Seventh Circuit has assumed, Justice Kennedy's opinion is not "the effective holding of the Court," *Newsome*, 256 F.3d at 751. An opinion in the midst of a splintered Court controls when it "concur[s] in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). But when there is no "lowest common denominator" among an array of opinions, it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994). Such is the case with *Albright*. The plurality refused to allow Albright to frame his malicious prosecution claim as a violation of substantive due process. Justice Kennedy concluded that while some in Albright's situation could proceed as a matter of procedural due process, Albright could not. Meanwhile, Justice Souter agreed with the plurality that Albright suffered no substantive due process violation but was open to allowing other malicious prosecution claims

to proceed in that manner. *See Albright*, 510 U.S. at 291 (opinion concurring in the judgment). None of these opinions nests within another.

More importantly, Justice Kennedy's opinion did not address the type of malicious prosecution claim at issue here. Even though Albright had been seized pursuant to legal process (he had been arrested pursuant to a warrant), Justice Kennedy stressed that Albright grounded his malicious prosecution claim not on his seizure, but on "interests other than the interest in freedom from restraint." *Albright*, 510 U.S. at 283 (Kennedy, J., concurring in the judgment); *see also id.* at 271 (plurality opinion) (noting seizure); *supra* at 14-15 (describing Albright's claim in more detail).

Manuel, by contrast, grounds his claim squarely on his seizure—his seven-week confinement in county jail. Justice Kennedy had no need in *Albright* to address whether such a claim could be brought under the Fourth Amendment. To the extent he addressed the subject at all, he "agree[d] with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment." *Albright*, 510 U.S. at 281; *see also id.* at 282 (noting that *Gerstein* doctrine applies to any "extended pretrial detention"). Hence, Justice Kennedy's reasoning appears to support—and certainly does not undermine—Manuel's claim.

The same is true of *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Wallace v. Kato*, 549 U.S. 384 (2007), which the Seventh Circuit has read to "imply" that, following the initiation of legal process, "the Fourth Amendment falls out of the picture" in favor of procedural due process, *Llovet*, 761 F.3d at 763.

Heck and *Wallace* merely say that a judicial finding of probable cause marks the boundary between claims for "false imprisonment" and "malicious prosecution." *See Wallace*, 549 U.S. at 389-90; *Heck*, 512 U.S. at 484. They say nothing about whether such claims sound in the Fourth Amendment or the Due Process Clause. Indeed, this Court stated explicitly in *Wallace*: "We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . and we do not do so here." 549 U.S. at 390 n.2 (citation omitted). Thus, neither case undermines Manuel's claim.

b. Requiring all malicious prosecution claims—even those grounded in illegal pretrial detentions—to be brought under the rubric of procedural due process would contravene not only *Albright* but other case law as well.

This Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975), expressly rejected the argument that "traditional requirements of constitutional due process [should be] applicable in the context of pretrial detention," *id.* at 127 (Stewart, J., concurring). "The Fourth Amendment," this Court explained, "was tailored explicitly for the criminal justice system, and . . always has been thought to define the 'process that is due' for seizures of persons or property in criminal cases, including the detention of suspects pending trial." *Id.* at 125 n.27 (majority opinion). The dictates of procedural due process, therefore, are "inapposite" in the context of pretrial detention. *Id.*; *see also James Daniel Good Real Prop.*, 510 U.S. at 50.

And there is good reason to prefer the Fourth Amendment over the Due Process Clause in the

context of pretrial detention without probable cause: The Fourth Amendment's easily administrable requirements are preferable to any regime of "scarce and open-ended guideposts." *Albright*, 510 U.S. at 275 (plurality opinion) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

Much like the substantive due process framework the *Albright* plurality refused to apply, procedural due process "is not a technical conception with a fixed content." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, the standard formula for assessing procedural due process claims is a "flexible," multi-pronged balancing test. *See id.* at 334-45. Where the Court has deviated from this standard formula, it has asked whether a given procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 446 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

Applying either of these standards to malicious prosecution claims grounded in pretrial detention without probable cause would threaten to generate the same uncertainties that applying substantive due process doctrine would have created. At least for this type of malicious prosecution claim, any choice between rooting such claims in the Fourth Amendment and the Due Process Clause should be resolved in favor of the Fourth Amendment.[9]

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[9] To the extent one can hazard a guess at how procedural due process might play out in this context, it could well require

III. Manuel's Fourth Amendment Malicious Prosecution Claim Is Cognizable Under Section 1983

As a general rule, Section 1983 provides a cause of action in federal court against any person who, acting under color of state law, deprives another of "any right[] . . . secured by the Constitution." 42 U.S.C. § 1983; *see generally Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980) (collecting cases). As a matter of plain text, therefore, this statute provides Manuel a cause of action against respondents for their violation of his Fourth Amendment rights.

The Seventh Circuit has held, however, that "there is no malicious prosecution claim under federal law if, as here, state law provides a similar cause of action." J.A. 102 (quoting *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001)). The court of appeals has also opined that, in any event, "there is nothing but confusion gained" by characterizing petitioner's claim for Section 1983 purposes as a "malicious prosecution" claim. *Id.* 103

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this Court to impose more burdensome procedures governing pretrial detention than the Fourth Amendment requires. In *Gerstein*, Justice Stewart maintained that the Fourth Amendment, as implemented by the majority, conferred "less procedural protection to an imprisoned human being" than procedural due process would dictate—indeed, less than the Fifth Amendment affords to the "garnishing [of] a commercial bank account" or the taking "custody of a refrigerator." *Gerstein*, 420 U.S. at 127 (Stewart, J., concurring) (citing cases); *see also James Daniel Good Real Prop.*, 510 U.S. at 52 (explaining that the *Mathews* test can be more stringent than the Fourth Amendment). The Court did not dispute that assertion. *See Gerstein*, 420 U.S. at 125 n.27.

(quoting *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009)).

Neither of these propositions is correct. The existence of state-law remedies is irrelevant here. And recognizing that Manuel's Fourth Amendment claim parallels a malicious prosecution claim confirms that his suit furthers the core purposes of Section 1983.

A. Manuel's Claim May Proceed Under Section 1983 Regardless of Whether State Law Provides a Remedy for Malicious Prosecution

When a Section 1983 claim is grounded in the Fourth Amendment, any alternative state remedy is immaterial. In the Fourth Amendment context, as with nearly all constitutional rights, "[t]he federal remedy" under Section 1983 "is supplementary to the state remedy." *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *see also Zinermon v. Burch*, 494 U.S. 113, 124-25 (1990) (plaintiffs "may bring a § 1983 action for an unlawful search and seizure . . . despite the fact that there are [state] common law remedies").

Therefore, as the Seventh Circuit conceded, the presence of a state-law remedy would be potentially relevant only if constitutional "claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment"—the theory being that state law might satisfy the requirements of procedural due process under *Parratt v. Taylor*, 451 U.S. 527 (1981), by providing an adequate post-deprivation remedy. J.A. 102. As we have shown, however, Manuel's claim is properly grounded in the Fourth Amendment.

Even if the Seventh Circuit were correct that claims for wrongful detention pursuant to an erroneous probable cause determination had to be brought as procedural due process claims, it would not necessarily follow that *Parratt*'s "post-deprivation remedy" doctrine would apply in this setting. This Court has applied *Parratt* where post-deprivation remedies are "the only remedies the State could be expected to provide," but not where, as here, the state already provides pre-deprivation legal process. *Zinermon*, 494 U.S. at 128-30; *see also Castellano v. Fragozo*, 352 F.3d 939, 956 (5th Cir. 2003) (holding that *Parratt* does not apply in malicious prosecution cases).

B. Allowing This Suit to Proceed Fulfills the Core Purposes of Section 1983

Allowing Fourth Amendment malicious prosecution claims to be brought under Section 1983 serves both of that statute's time-honored goals: compensating victims for violations of their civil rights and deterring state officers from such abuses.

1. Section 1983's "basic purpose" is to vindicate the fundamental tort-law objective "to compensate persons for injuries caused by the deprivation of rights." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-07 (1986) (Section 1983 "creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." (citation omitted)).

Allowing victims of wrongful pretrial detention to recover for their injuries furthers this goal. Individuals detained in this manner suffer myriad

harms. First and foremost, an individual subject to wrongful detention suffers a loss of freedom, including separation from family and society. In addition, a victim's "employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense." *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring). In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court likewise emphasized that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Id.* at 114; *see also* Crime & Just. Inst., *The Cost of Pretrial Justice* 2, http://bit.ly/1oS8UzR (economic effects of even a relatively brief detention can be significant, jeopardizing the victim's ability to afford such basic necessities as housing, medical care, and child support) (last visited May 1, 2016).

This case illustrates these harms. Manuel suffered from depression, extreme emotional distress, and anxiety during his forty-eight days in jail. J.A. 38-39, 42. This confinement also disrupted his employment and his college coursework, forced him to default on his bills and student loans, and caused him to lose his apartment—all in addition to the administrative fees that Will County imposed to impound and hold his car while it held him in jail. *Id.* 36-37.

2. Section 1983 also "seeks 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.'"

Richardson v. McKnight, 521 U.S. 399, 403 (1997) (emphasis omitted) (quoting *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)). In *Malley v. Briggs*, 475 U.S. 335 (1986), for example, this Court explained that providing a cause of action under Section 1983 against officers for obtaining and executing an arrest warrant without probable cause is "desirable" because it deters premature arrests "which may injure the innocent." *Id.* at 343-44. Likewise here, confirming that individuals can sue under Section 1983 when they are wrongfully detained pursuant to post-arrest legal process will deter officers from lying or misrepresenting evidence to magistrates.

3. When crafting rules under Section 1983 to enable a person to be "compensated fairly for injuries caused by the violation of his legal rights," this Court has also looked to "the common law of torts." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Carey*, 435 U.S. at 257-58).

The tort of malicious prosecution has a rich history at common law—dating back to at least the tenth century. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate*, 88 Yale L.J. 1218, 1221 (1979); *supra* at 7. So permitting such suits under Section 1983 breaks no new ground. Under Anglo-Saxon law, in fact, the tort carried an exceptionally severe penalty: "[H]e who shall accuse another wrongfully" was "liable in his tongue" if he failed to pay money damages. The Laws of King Edgar 4, *in Ancient Laws & Institutes of England* 113 (Benjamin Thorpe ed., 1840). In more recent centuries, the tort has permitted monetary compensation "for any arrest or imprisonment, including damages for discomfort or injury to [the

plaintiff's] health, or loss of time and deprivation of the society." *Heck*, 512 U.S. at 484 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 888 (5th ed. 1984)).

Permitting Fourth Amendment claims such as Manuel's to proceed would uphold the longstanding principle that victims of malicious prosecution are entitled to a damages remedy. It would enable monetary recoveries when officers cause individuals to be detained pursuant to legal process in the absence of probable cause and the officers' actions are so far outside the bounds of permissibility as to foreclose a qualified immunity defense. This remedy is the least our legal system should provide for innocent people who have been so victimized.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

This case does not ask the Court to decide whether police misstatements to obtain an arrest warrant, or to ratify a warrantless arrest at a *Gerstein* hearing, are constitutional violations, or even whether they are *Fourth Amendment* violations. The Seventh Circuit's decision below does not hold otherwise. It treats such violations as part and parcel of an unlawful arrest, a claim that is time-barred here because petitioner waited more than two years to file his complaint.

Instead, this case is about whether, as petitioner frames the question, he can assert "a *malicious prosecution* claim based upon the Fourth Amendment." Pet. i (emphasis added). Petitioner presents the question that way because his Fourth Amendment claim is timely only if it includes an element of *common-law* malicious prosecution—the so-called "favorable termination" element, which delays accrual of malicious prosecution claims by requiring plaintiffs to prevail first in the underlying "prosecution." If petitioner's Fourth Amendment challenge is not a "malicious prosecution" claim, as he has defined that term from the start of this litigation, then his claim fails (and the answer to the question presented is "no"), regardless of which proceedings are governed by the Fourth Amendment.

The petition for certiorari insisted that this case is of "national importance" because it asks the Court to decide whether claims like petitioner's receive the benefit of the common law's delayed-accrual rule, as courts on petitioner's side of the split have held in recognizing a Fourth Amendment claim with the "malicious prosecution" moniker. Pet. 19–21. This case

is an "ideal vehicle" for reconciling the circuit split, the petition continued, because, "if Manuel is to have an opportunity to be compensated for his injuries," he needs "[a] malicious prosecution claim," which "does not accrue, * * * until the criminal charges giving rise to the claim terminate in favor of the plaintiff." Pet. 25. Indeed, petitioner indicated, the "fate" of his Fourth Amendment challenge turns on whether he has the benefit of this common-law favorable-termination element. Pet. 21.

Yet petitioner's opening brief fails to discuss the elements of the Fourth Amendment malicious prosecution claim he asks the Court to recognize, including the favorable-termination element he needs to prevail. Petitioner focuses instead on whether alleged lies in support of a *Gerstein* finding are actionable under the Fourth Amendment—an argument the Seventh Circuit never rejected, and one that gets petitioner nowhere. Again, as the question presented reflects, petitioner needs not just any Fourth Amendment claim, but rather a Fourth Amendment *malicious prosecution* claim, complete with that tort's unique delayed-accrual rule.

It is not hard to understand why petitioner's opening brief fails even to define the elements of the malicious prosecution tort he asks the Court to adopt: The common-law elements petitioner seeks have no place in a §1983 Fourth Amendment claim. Most importantly, it makes no sense to condition relief for an unlawful *seizure* on whether the arrestee ultimately prevails on the merits *before or during trial.* The Fourth Amendment protects the guilty and innocent alike, and a person arrested without probable cause should not lack a Fourth Amendment remedy

because—while awaiting trial—the state gathers sufficient evidence to lawfully convict him.

Without a timely Fourth Amendment claim arising from his arrest and initial probable cause finding, petitioner could challenge his ongoing pretrial detention only by challenging the *prosecution* that caused it. But the Fourth Amendment does not govern prosecutions. Accordingly, once the initial seizure and probable cause finding are off the table (as they are here because of the time bar), petitioner must look to due process, not the Fourth Amendment, to vindicate the claim that his detention was unduly "prolonged." Pet'r Br. 13. Otherwise, challenges to grand jury proceedings, preliminary hearings, and trials all would become Fourth Amendment claims, provided only that the plaintiff alleged that these proceedings resulted in longer detention—including post-conviction incarceration—without probable cause.

STATEMENT

A. Legal Background

1. Malicious prosecution is a common-law tort with defined elements. It has long supplied a remedy for violations of one's "interest in freedom from unjustifiable litigation * * * ." Fowler V. Harper, *Malicious Prosecution, False Imprisonment & Defamation*, 15 Tex. L. Rev. 157, 159 (1937); see *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851). And it has balanced that private interest with the broader "social interest supporting resort to law" by requiring plaintiffs to prove a demanding slate of elements: "1. A criminal proceeding instituted or continued by the defendant against the plaintiff[;] 2. Termination of the proceeding in favor of the accused[;]

3. Absence of probable cause for the proceeding[;] [and] 4. 'Malice,' or a primary purpose other than that of bringing an offender to justice." W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* §119 at 871 (5th ed. 1984); see also *Restatement (Second) of Torts* §653 (1977).

2. "42 U.S.C. §1983 creates 'a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) (quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (internal quotation marks omitted)). But "[n]ot every common law tort committed by state or local government officials is actionable under §1983." *Brummett v. Camble*, 946 F.2d 1178, 1183 (5th Cir. 1991); see also *Daniels v. Williams*, 474 U.S. 327, 332 (1986); 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* §3.63 (4th ed. 2015). So while courts consider the common law when "identifying * * * the elements of the cause of action" for constitutional claims cognizable under §1983, *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), "the Court's precedents have not mechanically duplicated" the common law. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012); see *Hartman v. Moore*, 547 U.S. 250, 258 (2006) ("[T]he common law is best understood * * * as a source of inspired examples than of prefabricated components of [constitutional] torts.").

3. For many years, the Court had not addressed "the availability and contours of a §1983 malicious prosecution claim," including "when the cause of action accrues." *Campbell v. Brummett*, 504 U.S. 965, 966 (1992) (White, J., dissenting from denial of certiorari).

Most courts of appeals had held that malicious prosecution was cognizable as a §1983 tort only if the tort's common-law elements were met *and* "the defendants' conduct also infringe[d] some [other] provision of the Constitution or federal law." *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990).[1] Courts also split over the constitutional basis for a §1983 malicious prosecution claim, with the majority viewing it as a due process tort, *e.g.*, *Gallo v. City of Phila.*, 161 F.3d 217, 221 (3d Cir. 1998), and a minority concluding that it also could implicate Fourth Amendment interests, see *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988). There was "considerable confusion in the Courts of Appeals." *Campbell*, 504 U.S. at 966 (White, J., dissenting from denial of certiorari).

The plaintiff in *Albright v. Oliver* brought a §1983 claim alleging that an officer had procured an arrest warrant without evidence sufficient to establish probable cause. 510 U.S. 266, 268 (1994). He claimed that, because the warrant caused his arrest, the officer's actions "deprived him of substantive due process under the Fourteenth Amendment—his 'liberty interest'—to be free from criminal prosecution except upon probable cause." *Id.* at 269.

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[1] Accord *Mahoney v. Kesery*, 976 F.2d 1054, 1059–60 (7th Cir. 1992); *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988); *Dunn v. Tenn.*, 697 F.2d 121, 125–26 (6th Cir. 1982); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); *Sami v. United States*, 617 F.2d 755, 773–74 (D.C. Cir. 1979), *abrogated by Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The Court rejected Albright's substantive due process theory, but for different reasons borne of different understandings of his claim. A four-Justice plurality concluded that his claim failed because, in substance, he challenged the reasonableness of his arrest, which "constituted a seizure," making it "the Fourth Amendment, and not substantive due process, under which [plaintiff's] claim must be judged." *Id.* But because petitioner had not included a Fourth Amendment challenge in his petition for certiorari, the Court "express[ed] no view as to whether petitioner's claim would succeed under the Fourth Amendment." *Id.* at 275; see *id.* (Scalia, J., concurring) ("[H]ere * * * the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest.").

The plurality considered the claim as one based on Albright's arrest, rather than his prosecution, *id.* at 274, and therefore did not discuss the contours of a §1983 malicious prosecution claim. In fact, the plurality touched on malicious prosecution only in a footnote reporting that "the extent to which a claim of malicious prosecution is actionable under §1983 is one 'on which there is an embarrassing diversity of judicial opinion'" and that "[i]n view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a 'tort.'" *Id.* at 270 n.4 (citation omitted).

Concurring in the judgment, Justice Kennedy, joined by Justice Thomas, explained that while he agreed that "an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process[,] * * * [Albright's] due process claim concern[ed] *not* his arrest but instead the malicious

initiation of a baseless criminal prosecution against him." *Id.* at 281 (Kennedy, J., concurring in the judgment) (emphasis added). Because of that disagreement with the plurality over the crux of Albright's complaint, Justice Kennedy concluded that Albright could assert, at most, a §1983 procedural due process claim for malicious prosecution. Justice Kennedy further determined that any such claim—to the extent it was cognizable as a constitutional tort at all—would fail under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), because state law provided an adequate remedy, 510 U.S. at 283–84.

4. Six months later, the Court imported into certain §1983 claims a requirement it analogized to malicious prosecution's favorable-termination element. In *Heck v. Humphrey*, the Court held that "to recover damages for * * * actions whose unlawfulness would *render a conviction or sentence invalid*, a §1983 plaintiff must prove that the conviction or sentence has been reversed * * * ." 512 U.S. 477, 486–87 (1994) (emphasis added). Thus, "[j]ust as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor * * * so also a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489–90 (citations omitted). The Court later clarified that the *Heck* rule does *not* extend to Fourth Amendment claims for false arrest, which are concerned not with the outcome of a prosecution, but with the lawfulness of the initial seizure. *Wallace v. Kato*, 549 U.S. 384, 393 (2007). Indeed, *Wallace* called any extension of *Heck* to actions

that "would impugn *an anticipated future conviction*" both "bizarre" and "impractical[ ]." *Id.*

5. Following the Court's fractured decision in *Albright*, the courts of appeals remained splintered over §1983 malicious prosecution. Most construed *Albright* as grounding §1983 malicious prosecution in the Fourth Amendment, but then divided over how to square the tort with Fourth Amendment principles. For example, while all courts of appeals to consider the issue adopted a favorable-termination element as part of a Fourth Amendment malicious prosecution claim, many did so because it was an element at common law, *e.g.*, *Owens v. Balt. City State's Atty's Office*, 767 F.3d 379, 388–92 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1893 (2015);[2] others because of *Heck*, *e.g.*, *Kossler v. Crisanti*, 564 F.3d 181, 187 (3d Cir. 2009); and at least one on the theory that the favorable-termination element, like all other elements of §1983 malicious prosecution, applies so long as the relevant state-law malicious prosecution tort includes it, see *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997). Courts also divided over the common-law element of malice, with some holding that malicious prosecution does not require proof of malice, *e.g.*, *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100–01 (1st Cir. 2013), and others reading that common-law element into the Fourth Amendment claim, *e.g.*, *Grider v. City of Auburn*, 618 F.3d 1240, 1256 & n.24 (11th Cir. 2010).

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[2] Accord *Wilkins v. DeReyes*, 528 F.3d 790, 801 n.6 (10th Cir. 2008); *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066–68 (9th Cir. 2004); *Brummett*, 946 F.2d at 1183.

For its part, the Seventh Circuit recognizes a §1983 Fourth Amendment tort for unlawful seizure that accrues at the time of the initial seizure—whether at the moment of arrest or, at the latest, when the defendant is "arraign[ed]" or makes an "initial appearance in court." *Llovet v. City of Chi.*, 761 F.3d 759, 763 (7th Cir. 2014) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 1185 (2015). But the court declines to call this claim "malicious prosecution" or to read elements of the common-law tort—including the favorable-termination element—into it. So in the Seventh Circuit, "[r]elabeling a fourth amendment claim as 'malicious prosecution' [does] not extend the statute of limitations." *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

If the malicious initiation and maintenance of a prosecution itself violates the Constitution, then the Seventh Circuit holds that it violates procedural due process, not the Fourth Amendment. *Newsome*, 256 F.3d at 750–51; accord *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) (McConnell, J.); *Cordova v. City of Albuquerque*, 816 F.3d 645, 661–65 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment); *Kerr v. Lyford*, 171 F.3d 330, 342–43 (5th Cir. 1999) (Jones, J., specially concurring with Garza, J.), *abrogated by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). Embracing Justice Kennedy's concurrence in *Albright*, the Seventh Circuit further holds that under *Parratt*, there is no deprivation of procedural due process so long as the state provides an adequate remedy for malicious prosecution, as most states do. *Newsome*, 256 F.3d at 750–51.

B. Factual Background

1. On March 18, 2011, petitioner Elijah Manuel was a passenger in a car his brother was driving. First. Am. Compl. ¶¶20–22 (J.A. 62).[3] Respondent police officers for the City of Joliet pulled the vehicle over after observing it fail to signal a turn. J.A. 90. A patdown of petitioner revealed a bottle of pills, and the officers arrested petitioner for possession of ecstasy, a controlled substance. First Am. Compl. ¶¶21, 35, 38, 115 (J.A. 62, 63, 64, 69); J.A. 91–92.

Petitioner alleges that the bottle contained only vitamins, and that the officers knew this because both a field test at the scene, and a subsequent test at the police station, revealed that the pills did not contain a controlled substance. *Id.* ¶¶112–114, 121–122 (J.A. 69–70). The police reports nonetheless stated that the officers knew from their training and experience that the pills were ecstasy, and that an evidence technician's test confirmed that conclusion. J.A. 91–92.

2. Later that day, one of the respondent officers swore out a criminal complaint charging petitioner with unlawful possession of ecstasy in violation of the Illinois Controlled Substances Act, 720 ILCS 570/402(c). See J.A. 52–53.

3. As required by Illinois law, petitioner was brought before a court by videoconference for a

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[3] The district court granted respondents' motion to dismiss, and the Seventh Circuit affirmed that ruling. Accordingly, the factual allegations in petitioner's complaint (which respondents dispute) must be taken as true at this point in the proceedings. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"custody hearing" that same day, March 18, 2011.[4] See 725 ILCS §5/109-1(a). Petitioner waived the opportunity, at the hearing, to dispute that the officers' allegations satisfied probable cause for arrest. See *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975) (requiring judicial determination of probable cause following warrantless arrest, but holding that such proceedings may be non-adversarial). Also at petitioner's first appearance, the charges against him and his rights were explained, counsel was appointed, and bail was set. See 725 ILCS §5/109-1(b)(1)–(2), (4). That same day, petitioner was transferred from the respondent officers' custody to the Will County Adult Detention Facility. First Am. Compl. ¶132 (J.A. 72).

4. On March 31, 2011, respondent Officer Gruber testified to the positive test result before a grand jury, which returned an indictment for unlawful possession of a controlled substance. J.A. 93–96; *id.* at 54–55; see 725 ILCS §5/109-3.1(b) (providing that individuals charged with felonies must receive either preliminary hearing or indictment within 30 days of arrest). Petitioner was arraigned on the indictment on April 8, 2011. Pet. App. A2.

5. On April 1, 2011—between petitioner's indictment and arraignment on the indictment—a laboratory report issued stating that the pills were not a controlled substance. J.A. 51. The prosecution *nolle prossed* the charges against petitioner on May 4, 2011,

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[4] This description relies on a state-court docket sheet that, as petitioner notes, is not part of the record, see Pet'r Br. 4–5 & n.3, but is publicly available at the Will County Circuit Court website (https://ipublic.il12th.org/SearchPrompt.php) by clicking on the "Events" tab under case number 11CF00546.

and he was released from custody the next day. J.A. 48; Pet. App. A2.

C. Procedural History

1. On April 22, 2013—more than two years after his arrest, first appearance, indictment, and arraignment—petitioner filed a *pro se* complaint against the respondent officers and City of Joliet under §1983. Petitioner asserted claims of, *inter alia*, "wrongful and malicious" arrest and false imprisonment. J.A. 30, 35–37. He also alleged "malicious prosecution"—that one of the respondent officers "executed an erroneous and false complaint"; that "[a]s a result of this false complaint a return of an indictment was file[d] upon the plaintiff * * * without probable cause"; and that respondents "could have during the duration of plaintiff's false imprisonment, ascertained that plaintiff was being falsely imprisoned had [they] exercised reasonable diligence in performing [their] duties and not repeatedly refused to make reasonable and necessary factual investigation of the charges made against the plaintiff." J.A. 37–38.

2. The district court appointed counsel, who filed an amended complaint. J.A. 2–3, 58. This complaint similarly alleged, *inter alia*, that respondents arrested him without probable cause and engaged in malicious prosecution by "submitting false charges as contained in the criminal complaint and indictment" and "fail[ing] to take any steps to cause [petitioner] to be released from police custody" "due to the lack of probable cause supporting his arrest and continued detention." First

Am. Compl. ¶¶153, 156, 165, 173, 175, 179, 199–201 (J.A. 74–75, 77, 79–80, 83–84).[5]

3. Respondents moved to dismiss on statute-of-limitations grounds, arguing that Illinois's two-year limit for personal-injury torts barred petitioner's claims. Mem. of Law in Support of Mot. to Dismiss at 3, No. 1:13-cv-03022 (N.D. Ill. Dec. 4, 2013), ECF No. 30-1 (J.A. 6). Petitioner responded that, notwithstanding the two-year time bar, he "should have an actionable Section 1983 claim for malicious prosecution through the Fourth Amendment" because "[a] malicious prosecution claim does not accrue until the underlying proceedings terminate in favor of the plaintiff," making his claim timely. Pl.'s Modified Resp. in Opp'n to Defs.' 12(b)(6) Mot. to Dismiss at 4, No. 1:13-cv-03022 (N.D. Ill. Feb. 7, 2014), ECF No. 41 (J.A. 9).

The district court granted respondents' motions to dismiss. J.A. 10 (ECF No. 44); J.A. 97–99. The court dismissed all of petitioner's claims as time-barred, except his Fourth Amendment malicious prosecution claim, which would survive if it had a favorable-termination element, as petitioner alleged. J.A. 98. With respect to that claim, the court held that a "malicious prosecution" claim, as petitioner defined it, may not be brought under the Fourth Amendment, but instead arises under the Due Process Clause only if

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[5] Although petitioner alleged that respondents violated his due process rights by "submitting false charges as contained in the criminal complaint and indictment" and "falsely imprisoning [him] beyond a preliminary hearing," First Am. Compl. ¶165 (J.A. 77), petitioner did not press his due process claim in the district court or the Seventh Circuit and does not pursue it here. See J.A. 98; Pet i.

state law provides no adequate remedy. *Id.*; see *Newsome*, 256 F.3d at 750–52. Because Illinois law provides an adequate malicious prosecution remedy, the court dismissed the complaint. J.A. 99.

4. Petitioner appealed only the dismissal of his Fourth Amendment "malicious prosecution" claim, once again insisting that this claim was timely because "a malicious prosecution claim does not accrue until the underlying proceedings terminate in favor of the plaintiff." Br. of Pl.-Appellant, Elijah Manuel at 17, No. 14-1581 (7th Cir. June 27, 2014), ECF No. 16 (J.A. 21). Respondents countered that the Seventh Circuit should not abandon its case law, and that any §1983 claim is time-barred under Illinois's two-year limitations period. Br. of Defs.-Appellees at 5–9, No. 14-1581 (7th Cir. Aug. 18, 2014), ECF No. 25 (J.A. 22). In reply, petitioner again emphasized that "if [his] Amended Complaint is to survive a motion to dismiss, [he] must turn to the Fourth Amendment as a means to bring a Section 1983 malicious prosecution claim," which "does not accrue until the proceedings terminate in favor of the plaintiff." Reply Br. of Pl.-Appellant, Elijah Manuel at 3, 9, No. 14-1581 (7th Cir. Sept. 2, 2014), ECF No. 27 (J.A. 23).

The Seventh Circuit affirmed. J.A. 100–05. The court explained that "if Manuel has a Fourth Amendment claim * * * it would have stemmed from his arrest on March 18, 2011, which he would have had to challenge within two years, * * * but he did not sue until April 10, 2013." J.A. 103. The court further indicated that under its precedent, following arraignment, any "malicious prosecution" claim is governed by the Due Process Clause, and that claim is available only if—unlike in Illinois—state law fails to

provide a similar cause of action. J.A. 102–03 (discussing *Newsome*, 256 F.3d at 750–52). The court explained that, while *Newsome* did not preclude Fourth Amendment claims "generally" (citing, *inter alia*, *McCullach v. Gadert*, 344 F.3d 655 (7th Cir. 2003), which "recogniz[ed] a Fourth Amendment wrongful-arrest claim against an officer who allegedly gave false information in an incident report and at a preliminary hearing"), "any Fourth Amendment claim that petitioner might bring is time-barred." J.A. 103.

5. Petitioner sought certiorari review on the question of "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." Pet. i. Petitioner argued that the question was one of "national importance" because, unlike claims for false arrest, "malicious prosecution claims purvey a forgiving statute of limitations as the claims do not accrue until the charges terminate in the plaintiff's favor." Pet. 21 (internal quotation marks omitted); see also Pet. 25. And petitioner assured the Court that his case presented this issue squarely, for he needs malicious prosecution's common-law favorable-termination element for his claim to survive: "In the present case, the availability of a malicious prosecution claim and its statute of limitations will determine Manuel's fate." Pet. 21.

Respondents opposed certiorari, again arguing that any §1983 malicious prosecution claim would be time-barred. Br. in Opp. 4–5. In reply, petitioner reaffirmed his reliance on the favorable-termination element of common-law malicious prosecution. Pet. Reply 1–2.

6. This Court granted Manuel's petition on January 15, 2016.

SUMMARY OF THE ARGUMENT

1. The Court should affirm the judgment below because the Fourth Amendment is incompatible with the common-law elements of malicious prosecution. That includes the favorable-termination element petitioner admittedly needs to render his claim timely. Indeed, requiring plaintiffs claiming an unlawful seizure to succeed on the merits of the underlying prosecution would make little sense, for the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures. Importing a successful-outcome element into the Fourth Amendment (or expanding *Heck* to read this element into §1983 in this context) would withhold a Fourth Amendment remedy from victims of wrongful seizures who later are legitimately convicted.

2. Without a timely challenge to his initial arrest and probable cause finding, petitioner could put an end to his ongoing detention only by attacking the prosecution for which he was detained. That is not a Fourth Amendment issue. Due process alone governs claims, like petitioner's, alleging perversion of the procedures designed to determine whether the prosecution should continue and whether the defendant must remain detained during it.

ARGUMENT

I. Any Fourth Amendment Claim Petitioner Had Is Time-Barred, And He Cannot Overcome That Bar By Labeling His Claim "Malicious Prosecution."

It is common ground that if petitioner's allegations are true, he could have brought a Fourth Amendment claim based on his allegedly unlawful arrest (a Fourth Amendment "seizure"), which occurred on March 18, 2011. As the Seventh Circuit recognized, however, petitioner waited more than two years to file his complaint. J.A. 103. In fact, the only affirmative act that allegedly took place after March 18, 2011 was Officer Gruber's March 31, 2011 testimony before the grand jury. But that testimony, too, occurred more than two years before petitioner filed his suit, see J.A. 93–96, and as the United States recognizes, Officer Gruber is immunized for that testimony in any event. See Br. for the United States as Amicus Curiae Supporting Petitioner at 30 ("U.S. Br."); *Rehberg*, 132 S. Ct. 1497. Thus, as petitioner concedes, his Fourth Amendment claim is timely only if it benefits from a special rule delaying accrual. See Pet. 21, 25.

Petitioner's need for delayed accrual is why he asked this Court to recognize a Fourth Amendment claim of "malicious prosecution." Most courts of appeals to recognize such a claim have done so only by incorporating the common-law elements of malicious prosecution into §1983 wholesale, including the favorable-termination element. See *supra* p. 8. Accordingly, petitioner asks not merely whether *some* Fourth Amendment right "continues beyond legal process," Pet'r Br. i, but whether it does so "to allow a

malicious prosecution claim based upon the Fourth Amendment." *Id.* (emphasis added); see also Pet. 21 (conceding that petitioner needs malicious prosecution's favorable accrual rule for his claim to be timely); Pet'r Br. 35 (citing the "rich history" of malicious prosecution "at common law").

That is a question the *Albright* plurality never answered, for it did not purport to address the existence of a constitutional claim for malicious prosecution, much less its elements. *Albright*, 510 U.S. at 270 n.4; Nahmod, *supra*, §3.66; see *supra* p. 6. The Seventh Circuit's resolution of this question is correct: There is no Fourth Amendment claim with the common-law elements of malicious prosecution. Nor does *Heck* append a favorable-termination element via §1983 where, as here, petitioner does not challenge a conviction or sentence.

In straining to avoid the consequences of his own delay, petitioner would deprive others of the Fourth Amendment protections he seeks. Many people may be detained without probable cause based on an improperly-issued warrant or erroneous *Gerstein* finding in violation of the Fourth Amendment, only to be convicted constitutionally after prosecutors gather more evidence. Petitioner's favorable-termination rule would strip these people of their right to recover under §1983, no matter how patently unlawful the defendants' alleged conduct. And his rule would do so without any justification: The Fourth Amendment is concerned with searches and seizures, not prosecutions. So petitioner gets it backwards when he asserts that "[a]llowing Fourth Amendment malicious prosecution claims to be brought under Section 1983 serves * * * that statute's time-honored goals." Pet'r Br. 33. In fact, reading

malicious prosecution into the Fourth Amendment would subvert both §1983 and the Fourth Amendment.

A. Petitioner Cannot Rely On The Elements Of Common-Law Malicious Prosecution To Delay Accrual Of A Fourth Amendment Claim.

Petitioner and courts on his side of the circuit split attempt to delay accrual by incorporating into a Fourth Amendment claim the elements of common-law malicious prosecution. See *supra* p. 8. So long as the cause of action is called "malicious prosecution," the theory seems to run, it automatically embraces these elements. See Pet'r Br. 35 ("The tort of malicious prosecution has a rich history at common law * * * * [s]o permitting such suits under Section 1983 breaks no new ground.").

But malicious prosecution's elements do not fit a Fourth Amendment claim. These elements are over-inclusive because favorable termination and malice, two of the four common-law elements, are irreconcilable with bedrock Fourth Amendment law. At the same time, they are under-inclusive because, as the United States acknowledges, malicious prosecution at common law "does not have seizure as an element," although it is "a necessary component of a Fourth Amendment claim." U.S. Br. 24 n.15.

In short, any Fourth Amendment "malicious prosecution" claim petitioner could bring would share little with its namesake. And without the common law's favorable-termination element, which is impossible to square with the Fourth Amendment, petitioner's claim is untimely. For that reason alone, the answer to the question presented is "no"—the

Fourth Amendment does not permit a "malicious prosecution" claim of the sort petitioner requires.

1. Malicious Prosecution's Favorable-Termination Element Does Not Apply To Petitioner's Fourth Amendment Claim.

1. The favorable-termination element makes sense in the context of a common-law malicious prosecution claim, which is concerned with the legitimacy of the *prosecution* itself. But it has no place under the Fourth Amendment, which protects against "unreasonable searches and seizures" and "warrants" issued without "probable cause." U.S. Const. amend. IV. The Amendment says nothing about the standards for initiating or maintaining a prosecution, and it is agnostic as to how that prosecution ends.

As the Court explained in *United States v. Leon*, "[t]he wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself." 468 U.S. 897, 906 (1984) (internal quotation marks omitted). That the individual is subsequently prosecuted, and possibly convicted, "'work[s] no new Fourth Amendment wrong.'" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

Gerstein thus made clear that the Fourth Amendment does not "entitle[] [the accused] to judicial oversight or review of the decision to prosecute." 420 U.S. at 119; U.S. Br. 8 ("The Fourth Amendment does not govern the decision to pursue criminal charges."); see U.S. Br. 12. *Albright* likewise made this plain, for both the plurality and Justices Kennedy and Thomas agreed that the Fourth Amendment provides no standard for reviewing the initiation of a prosecution.

See *Albright*, 510 U.S. at 274 (plurality op.); *id.* at 282–83 (Kennedy, J., concurring).

The Fourth Amendment's history teaches the same lesson. The Amendment was "originally understood [as] focused on restraining police action before the invocation of judicial processes." *Cordova*, 816 F.3d at 662 (Gorsuch, J., concurring in the judgment). It aimed to safeguard the same interests long protected by common-law trespass torts such as residence trespasses and false imprisonment. See, *e.g.*, William J. Cuddihy, *The Fourth Amendment: Origins & Original Meaning 602-1791*, 440–45 (2009); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 576–77, 588–89 (1999).

Just as the Fourth Amendment does not govern the decision to prosecute, a Fourth Amendment claim does not depend on the prosecution's outcome. On the one hand, an "illegal arrest or detention does not void a subsequent conviction." *Gerstein*, 420 U.S. at 119. And on the other, an arrestee who later is properly *convicted* may recover under §1983 for earlier Fourth Amendment violations. The Court in *Haring v. Prosise* thus held that a prisoner's guilty plea to possessing items found in a search did not bar his action to recover on the theory that the search was unlawful. 462 U.S. 306 (1983). The conviction was "simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under §1983." *Id.* at 316. This is because, as the Court recognized, a Fourth Amendment violation becomes no less unlawful if the defendant is later convicted.

Malicious prosecution's favorable-termination element thus is impossible to square with the Fourth Amendment.

2. While petitioner and several courts of appeals rely directly on common-law malicious prosecution to delay accrual of a Fourth Amendment claim, see *supra* p. 8, the United States instead invokes *Heck* in advocating for that result, see U.S. Br. 24–25 n.16. But *Heck* does not apply to Fourth Amendment claims that do not challenge any existing conviction or sentence.

In *Heck*, the Court analogized to the common law of malicious prosecution to hold that where a criminal defendant's successful §1983 suit would "*necessarily* imply the invalidity of" an existing "conviction or sentence * * *, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487 (emphasis added). The Court took care to limit this rule to instances where §1983 plaintiffs challenged a conviction or sentence: "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed" or otherwise set aside. *Id.* at 486–87.

The Court, however, instructed that this favorable-termination requirement generally would *not* apply to Fourth Amendment claims: "[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction." *Id.* at 487

n.7. The favorable-termination requirement does not apply to such claims because, "even if successful, [they] would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.*

In *Wallace*, the Court turned that caveat into a square holding. The petitioner argued, like the United States here, that *Heck*'s "favorable termination" requirement delayed accrual of his Fourth Amendment unlawful-arrest claim under §1983 "until the State dropped its charges." *Wallace*, 549 U.S. at 392. The Court rejected that argument. It reaffirmed that *Heck* applies only in the face of "an 'outstanding criminal judgment'" or "*an extant conviction*," and does not apply to claims that an "initial Fourth Amendment violation set the wheels in motion" for a subsequent detention or conviction that has yet to occur. *Id.* at 393, 391. That is because, again, the success of the Fourth Amendment claim does not turn on the termination of those proceedings, favorable or otherwise. See *id.*

Accordingly, while the United States asserts in a footnote that *Heck* should apply to petitioner's Fourth Amendment claim for "unlawful pretrial detention pursuant to legal process," U.S. Br. 24–25 n.16, that argument contravenes both *Heck* and *Wallace*. And that cursory footnote—without which the United States' brief would not support reversal of the judgment below, for petitioner's claim would be time-barred—is virtually without reasoning. The government explains why a favorable-termination requirement makes sense for a garden-variety "malicious prosecution" claim, *id.*, but it says nothing about the only question that matters here: Why that requirement is appropriate for a Fourth Amendment claim that, by definition, is concerned not with the

result of a criminal proceeding, but with whether the initial search or seizure was supported by probable cause.

3. Moreover, appending a favorable-termination element or expanding *Heck*'s rule beyond its stated limits would *under-serve* the Fourth Amendment's protections—available to guilty and innocent alike, see *Haring*, 462 U.S. at 316—against unlawful searches and seizures. If, as petitioner and his amici contend, a Fourth Amendment claim exists based on an improper warrant or *Gerstein* finding only when the civil plaintiff can show a favorable termination of the criminal proceedings against him, the Fourth Amendment would exclude from its protections individuals seized without probable cause but ultimately tried and convicted based on other, constitutionally acquired evidence. See Br. of Albert W. Alschuler as Amicus Curiae in Support of Petitioner 35–37 ("Alschuler Br."). This would permit officers to arrest and detain without probable cause in the hopes of later gathering evidence justifying a prosecution and, ultimately, a guilty plea or conviction.

That is not how the Fourth Amendment or §1983 should work. From both a deterrence and a remedial perspective, individuals seized without probable cause should be able to recover for Fourth Amendment violations, regardless of whether they are ultimately convicted of a crime, so long as they bring their claims in a timely manner. Cf. *Leon*, 468 U.S. at 906–08 (explaining deterrence-based policy behind exclusionary rule). This is far more consistent with §1983's "'basic purpose' * * * 'to compensate persons for injuries caused by the deprivation of rights,'" Pet'r Br. 33 (quoting *Carey*, 435 U.S. at 254–55), than a rule

denying compensation to an entire class of Fourth Amendment claimants in exchange for the delayed-accrual rule this petitioner needs to save his late-filed claim.

2. Fourth Amendment Principles Are Impossible To Square With Other Elements Of Common-Law Malicious Prosecution.

Malicious prosecution does not fit the Fourth Amendment for other reasons, too. That matters because, again, many courts recognizing a malicious prosecution claim under the Fourth Amendment adopt a favorable-termination element only as part of the *wholesale* incorporation of the common-law tort, as petitioner appears to advocate. See *supra* p. 8. But that approach badly mangles constitutional principle. The key common-law element of "malice" has no Fourth Amendment basis, and conversely, the Fourth Amendment's seizure requirement has no place in common-law malicious prosecution. For this reason, too, the strange creature petitioner conjures to render his claim timely—"Fourth Amendment malicious prosecution"—does not exist.

1. At common law, malice (as the tort's name suggests) was an "indispensable" and "foundation[al]" element of a malicious prosecution claim, and it remains so today. See, *e.g.*, Martin L. Newell, *A Treatise on the Law of Malicious False Imprisonment & the Abuse of Legal Process as Administered in the Courts of the United States of America* 7 (1892) (citing state cases); *Restatement (Second) of Torts* §668. The element dates back to at least the late thirteenth century, when the writ of conspiracy emerged to address the problem of

individuals encouraging one another to falsely and "maliciously" "indict" a victim. See Note, *Groundless Litigation & the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1224–25 & nn.52–53 (1979). Malice developed as a central component of malicious prosecution because this element, by requiring a subjective inquiry and improper intent, ensures that tort liability will not deter legitimate law enforcement activity. See, *e.g.*, *Glenn v. Lawrence*, 117 N.E. 757, 759 (Ill. 1917); *Sherburne v. Rodman*, 8 N.W. 414, 414-15 (Wis. 1881); *Bruington v. Wingate*, 7 N.W. 478, 479 (Iowa 1880).

2. Yet as petitioner's own amici concede, a "subjective inquiry into malice * * * is foreign to Fourth Amendment analysis." Br. for the Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner 22. That is because the question under the Fourth Amendment is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *E.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citing *Scott v. United States*, 436 U.S. 128, 137–39 (1978), and *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Kentucky v. King*, 563 U.S. 452, 464 (2011). "[T]he Fourth Amendment regulates conduct rather than thoughts," making an individual officer's subjective intent irrelevant. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 736 (2011).

Indeed, this Court has rejected use of "malice," specifically, in Fourth Amendment cases. See *Graham*, 490 U.S. at 399. As the Court explained, using a "'malicious and sadistic'" standard would "put[] in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on

whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.* at 397 (citation omitted); see also *id.* at 399 ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and *subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry.*" (emphasis added)).

3. Perhaps recognizing the inconsistency between malice and the Fourth Amendment, petitioner ignores this element. Meanwhile, the United States contends that "[t]he intent required for a Section 1983 Fourth Amendment claim of unlawful pretrial detention is *not* directly akin to the common-law element of 'malice.'" U.S. Br. 25–26 n.17 (emphasis added). Instead, on this view, a plaintiff must "establish that the defendant officers acted with intent to deceive or with reckless disregard of the absence of probable cause." *Id.* at 25.

But this argument not only abandons the common law; it also runs afoul of the Fourth Amendment. The Fourth Amendment search-or-seizure inquiry is objective, while the government's "intent to deceive" and "reckless disregard" standard is not. Nor does *Franks v. Delaware*, 438 U.S. 154 (1978), support the government's position. See U.S. Br. 27. *Franks* held that, to obtain a hearing, a criminal defendant moving to suppress evidence seized pursuant to a warrant must show that the supporting affidavit contained deliberate or reckless falsehoods essential to the finding of probable cause. *Id.* at 171–72. But that standard arises "from [the] language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise." *United States v. Calderon*, 348 U.S. 160, 164 (1954). *Franks* says nothing about the Search and Seizure Clause, which emphasizes "reasonableness" and forecloses a subjective inquiry. See, *e.g.*, *Scott v.*

United States, 436 U.S. 128, 137 (1978) (discussing *Terry*, 392 U.S. at 21–22).

4. Moreover, a common-law malicious prosecution claim does not require the plaintiff to suffer a seizure within the meaning of the Fourth Amendment. See U.S. Br. 24 n.15. Indeed, unlike a claim for false arrest or false imprisonment, malicious prosecution does not care whether the plaintiff was seized.

At common law, "the appropriate form of action for imposing a confinement was trespass for false imprisonment," *Restatement (Second) of Torts* §35 cmt. a, and the damages were (and are) "those that flow[ed] from the detention" itself. 32 Am. Jur. 2d *False Imprisonment* §135 (2007). By contrast, "[m]alicious prosecution [was] frequently classified with slander and libel as an injury to the reputation"; its concern with detention was secondary at best. *Minneapolis Threshing-Mach. Co. v. Regier*, 70 N.W. 934, 936 (Neb. 1897); see, *e.g.*, *Stancliff v. Palmeter*, 18 Ind. 321, 324–25 (1862); see also *Restatement (Second) of Torts* §670. If the plaintiff happens to have been arrested or imprisoned during the course of proceedings, he also may seek "[s]pecial [d]amages" for his resulting injuries. *Restatement (Second) of Torts* §671. Detention is thus one potential byproduct of malicious prosecution, but not one that is central, much less necessary, to the tort itself. See, *e.g.*, Newell, *supra*, at 16; Herbert Stephen, *The Law Relating to Actions for Malicious Prosecution* 117 (1889).

In short, malicious prosecution's elements do not fit with a Fourth Amendment claim, which concerns search or seizure, not prosecution and conviction, and which is unconcerned with a defendant's subjective

mental state. Petitioner thus cannot achieve the delayed accrual he needs by incorporating the common-law elements into a Fourth Amendment claim under §1983.

B. Petitioner Has Not Relied And Cannot Rely On A Continuing-Violation Theory.

1. Nor can petitioner save his untimely claim by contending that a seizure constitutes a continuing Fourth Amendment violation that delays his claim's accrual—an argument that petitioner not only failed to make earlier, but would be contrary to his prior representations to this Court.[6]

To be sure, some members of the Court have suggested that a Fourth Amendment malicious prosecution claim might accrue years after the alleged unlawful search or seizure because the defendant-turned-plaintiff remains "seized" for Fourth Amendment purposes so long as the prosecution against him is pending. *Albright*, 510 U.S. at 277–79 (Ginsburg, J., concurring); *id.* at 307 (Stevens, J., dissenting). This Court's holdings, however, are to the contrary. When a plaintiff claims to have suffered from a discrete wrong, the time of that wrong governs accrual, even when "the *effects*" of that wrong continue and "bec[o]me most painful" thereafter. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). Indeed, even if a defendant has "give[n] present effect to the

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[6] Again, petitioner insisted that the presence *vel non* of the favorable-termination element will "determine [his] fate." Pet. 21. Accordingly, petitioner has forfeited, if not outright waived, this argument. See, *e.g.*, *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

past illegal act and therefore perpetuate[d] the consequences," the date of the original wrong still defines the claim's accrual. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977).

Those teachings control here. The "seizure" of a warrantless arrest "is a single act, and not a continuous fact." *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (quoting *Thompson v. Whitman*, 85 (18 Wall.) 457, 471 (1874)); see, *e.g.*, *Leon*, 468 U.S. at 906 ("The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself.") (citation omitted). The seizure is fully accomplished no later than when the *Gerstein* hearing blesses it. The Court followed this principle in *Wallace*, rejecting plaintiff's claim that his "false imprisonment ended upon his release from custody" and holding instead that his claim accrued when he "appeared before the examining magistrate and was bound over for trial." 549 U.S. at 390, 391; see *infra* Section II.C.

Indeed, even petitioner appears to recognize that his "'detention[] * * * pending trial'" was merely a "consequence[]" of the earlier alleged wrong. Pet'r Br. 14, 24 (quoting *Gerstein*, 420 U.S. at 125 n.27) (some quotation marks omitted). But the continuing effects of that initial seizure—like the continuing effects of other statutory and constitutional violations—do not delay accrual.

2. The circumstances in which this Court has recognized a continuing-violation theory prove the point. The theory applies when the plaintiff's claim does *not* consist of "discrete acts," but rather alleged wrongs that by "[t]heir very nature involve[ ] repeated conduct" that becomes unlawful *only* via its ongoing

character—as, for example, in a challenge to a hostile work environment or racial steering in housing. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002); see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982). And while such claims are timely so long as "an act contributing to the claim occurs within the filing period," *Morgan*, 536 U.S. at 117, those claims still require "affirmative acts of the defendants" in the limitations period, *Cowell v. Palmer Twp.*, 263 F.3d 286, 293 (3d Cir. 2001) (citing *Ricks*, 449 U.S. at 258). But petitioner's claim concerns a discrete seizure, and he has not alleged *any* affirmative acts by respondents that occurred less than two years before he filed his complaint.

In light of these settled principles, lower courts repeatedly have rejected the argument that ongoing detention following a seizure works a "continuing violation" that defers the start of the limitations period until the detention ends. *MacNamara v. Hess*, 67 F. App'x 139, 143 (3d Cir. 2003); see, *e.g.*, *Batiste v. City of Boston*, 23 F.3d 394, 1994 WL 164568, at *2 (1st Cir. 1994) (unpublished table decision) (per curiam, joined by Breyer, J.); *McCune v. City of Grand Rapids*, 842 F.2d 903, 905–06 (6th Cir. 1988); *Becker v. Kroll*, 494 F.3d 904, 915–16 (10th Cir. 2007). As these courts explain, "[d]ecades of Fourth Amendment precedent [from this Court] ha[s] focused on the initial deprivation of liberty," "reflect[ing] [that] the Fourth Amendment's core concerns" are with the "'initial decision to detain an accused,'" not the period of detention (or prosecution) that may follow. *Riley v. Dorton*, 115 F.3d 1159, 1162–63 (4th Cir. 1997) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979)), *abrogated*

on other grounds by Wilkins v. Gaddy, 559 U.S. 34 (2010).[7]

Accordingly, lower courts that permit delayed accrual of §1983 claims under the Fourth Amendment do so not by adopting the continuing-violation theory, but by incorporating malicious prosecution's favorable-termination element, or by relying on *Heck*. See *supra* p. 8. Similarly, the United States and petitioner's other amici seek to achieve delayed accrual in these other ways, implicitly rejecting a continuing-violation theory.

3. Finally, the continuing-violation theory (like adoption of malicious prosecution's favorable-termination element, or an unwarranted expansion of *Heck*) runs contrary to the very purpose of a statute of limitations. Such statutes, and §1983's incorporation of them, recognize that "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred." *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487, 492 (1980) (§1983 suit barred by New York statute of limitations); see, *e.g.*, *Wallace*, 549 U.S. at 396 ("'States and municipalities have a strong interest in timely notice of alleged misconduct by their agents.'") (citation omitted).

If a Fourth Amendment malicious prosecution claim does not accrue until after the case terminates

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[7] These courts further recognize that a continuing-violation theory under the Fourth Amendment runs afoul of this Court's own treatment of conditions-of-confinement cases, which are governed by the Due Process Clause or the Eighth Amendment, not the Fourth Amendment. See *Becker*, 494 F.3d at 915–16.

against the plaintiff (whether favorably or unfavorably), law enforcement officers would find themselves defending against such claims years or even decades after the allegedly unlawful search or seizure, often only after the §1983 plaintiff completes a period of incarceration following conviction. Such defenses, even against baseless claims, would become difficult if not impossible as "[w]itnesses die or move away; physical evidence is lost; [and] memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986). For this reason, too, this Court should reject a continuing-violation view of the Fourth Amendment.

C. Without A Favorable-Termination Element Or Continuing Violation, Petitioner's Claim Fails.

Thus, if petitioner had a viable §1983 Fourth Amendment claim, it accrued when he was seized, and probable cause for the seizure found, on March 18, 2011. That claim was therefore barred by Illinois's applicable two-year statute of limitations. Petitioner cannot avoid that result by incorporating common-law elements with no grounding in the Fourth Amendment. Nor can he delay the accrual of his claim by arguing (implicitly, and for the first time) that he suffered a continuing Fourth Amendment violation for the entire period of his prosecution.

In fact, petitioner never advances any express theory as to why his Fourth Amendment claim is timely. To the extent one can be discerned, it begins with the reference in *Wallace* to a "malicious prosecution" claim that arises after "institution of legal process." Pet'r Br. 7, 13. *Wallace*, petitioner says, "refer[ed] to an arrest warrant as 'legal process,'"

which petitioner takes to mean that the Fourth Amendment—which governs arrest warrants—houses the "malicious prosecution" claim described in *Wallace*. See Pet'r Br. 17–19 (citing *Malley v. Briggs*, 475 U.S. 335 (1986)). A *Gerstein* hearing, petitioner goes on, is "'the same'" for relevant purposes as an arrest warrant. Pet'r Br. 20 (quoting *Gerstein*, 420 U.S. at 120). And so, petitioner concludes, "detention by reason of a *Gerstein* hearing" is likewise detention pursuant to "legal process" and therefore supports a claim for "malicious prosecution * * * under the Fourth Amendment." Pet'r Br. 10, 21 (internal quotation marks omitted).

Putting aside the fact that *Wallace* does not hold that an arrest warrant is "legal process" as petitioner uses the term, see *infra* pp. 48-49, his argument fails because it assumes away the only question that matters. What determines petitioner's "fate" is whether there exists a "malicious prosecution" claim under the Fourth Amendment *that contains the favorable-termination element* petitioner needs. Pet. 21. But as explained above, such an element is foreign to the Fourth Amendment. And that remains true however one parses *Wallace*'s references to "malicious prosecution" and "legal process." So while arrest warrants and *Gerstein* hearings serve the same basic function in assessing probable cause for an initial arrest, that only reinforces why a favorable-termination element does not apply to alleged misstatements at *either* stage.

In short, *Wallace*'s bare mention of the term "malicious prosecution" is too thin a reed to carry the weight of a favorable-termination element that cannot be squared with the Fourth Amendment. See *Wallace*, 549 U.S. at 390 n.2 ("We have never explored the

contours of a Fourth Amendment malicious-prosecution suit under §1983, * * * and we do not do so here."). Without that element, it is immaterial whether *Wallace* would label petitioner's claim as one for false arrest or malicious prosecution. Either way, the claim is untimely.

II. After The Prosecution Begins, The Due Process Clause, Not The Fourth Amendment, Governs Petitioner's Claim That His Detention Was Unduly Prolonged.

As Part I shows, the Fourth Amendment does not house a constitutional tort with the favorable-termination element that would delay accrual of petitioner's otherwise untimely claim. This Court's inquiry may end there. The answer to the question presented is "no": There is no "malicious prosecution claim," as petitioner must define the term, "based upon the Fourth Amendment." Pet. i. Accordingly, even if petitioner were correct that officer misstatements violate the Fourth Amendment whenever they cause a person to be detained—whether those misstatements occur at a warrant hearing, a *Gerstein* hearing, before a grand jury, at a preliminary hearing, or elsewhere—on the facts of this case petitioner's claim fails as a matter of law.

But petitioner's claim also fails because he has no Fourth Amendment claim for "continued detention" after his initial seizure and probable cause finding. First Am. Compl. ¶175 (J.A. 79). Following a *Gerstein* finding of probable cause—at least as far as the Fourth Amendment is concerned—the suspect may be detained until he is tried or the charges are dropped.

Petitioner contends that the prosecution was abusive and should have stopped (along with his detention) earlier than it did. *Id.* ¶¶153, 156, 165, 169, 173, 179, 199–201 (J.A. 74–75, 77–80, 83–84); Pet i. But if such a claim—which contests the validity of the *prosecution*—has a constitutional home anywhere, it is not the Fourth Amendment. The Due Process Clause is the only possible grounding for a claim that petitioner suffered a deprivation of liberty because respondents allegedly encouraged an abusive prosecution and frustrated the procedural safeguards meant to prevent baseless prosecutions. U.S. Const. amend. XIV.

A. There Is No Fourth Amendment Claim For Unduly Prolonged Detention Following Arrest And Commencement Of Prosecution.

1. The only requirement the Fourth Amendment prescribes for pretrial detention is an independent assessment of probable cause for the initial seizure. That may occur via an arrest-warrant proceeding before the seizure, or via a *Gerstein* finding after. *Gerstein*, 420 U.S. at 118, 124–25. Either way, that initial assessment is all this Court has ever required, as a Fourth Amendment matter, for "the detention of suspects pending trial." *Id.* at 125 n.27; see *id.* at 111 (*Gerstein* hearing authorizes suspect to be "held for trial"); *Michigan v. Doran*, 439 U.S. 282, 295 (1978) (*Gerstein* spelled out "[t]he requirements of the Fourth Amendment" in this area).

By contrast, when the initial seizure is *not* at issue, there is no Fourth Amendment right to be released from detention before the conclusion of trial or the

dismissal of charges. See *Gerstein*, 420 U.S. at 111, 125 n.27; *Baker v. McCollan*, 443 U.S. 137, 144–45 (1979); see also *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979) (after *Gerstein* probable cause finding, "the Government may permissibly detain a person suspected of committing a crime prior to a[n] * * * adjudication of guilt" at trial (citing *Gerstein*, 420 U.S. at 111–14)). That remains true whether the initial assessment is unassailable because it was concededly lawful or because, as here, challenges to it are time-barred. *United Airlines*, 431 U.S. at 558 (act "not made the basis for a timely charge" is "treat[ed] * * * as lawful"). If a defendant (or later, a civil plaintiff) claims entitlement to an earlier release, he must seek refuge elsewhere in the "elaborate system * * * designed to safeguard the rights of those accused of criminal conduct," of which the Fourth Amendment is "only the first stage." *Gerstein*, 420 U.S. at 120–23, 125 n.27; see *infra* Section II.B.

The Court recognized this principle in *Baker v. McCollan*. There, the plaintiff alleged that after executing a valid arrest warrant, a sheriff failed to undertake "adequate identification procedures" "despite his protests of mistaken identity." 443 U.S. at 142, 144. The Court explained that because the plaintiff had not challenged the underlying warrant or arrest, he failed to state a Fourth Amendment claim. *Id.* at 143–44. Instead, when the plaintiff alleged he suffered "prolonged detention caused by" the sheriff's errors, the "constitutional provision allegedly violated" was the Due Process Clause or, potentially, "the right to a speedy trial." *Id.* at 142, 144–45.

2. Even when initially authorized by the Fourth Amendment, detention may continue only so long as a

prosecution proceeds. Arrest alone does not authorize indefinite detention, so unless the decision is made to prosecute (and continue that prosecution), the defendant must be released. See *Baker*, 443 U.S. at 144–45. Accordingly, at some juncture following an initial seizure, a criminal defendant's continued pretrial detention is due to the prosecution, rather than the initial arrest and probable-cause finding. See generally *Hartman*, 547 U.S. at 262–63; *Graham*, 490 U.S. at 395 n.10. That is why petitioner must concede that his theory is more accurately described as "unreasonable *prosecutorial* seizure." Pet'r Br. 13 (internal quotation marks omitted) (emphasis added). The defendant remains detained only because the prosecution continues.

But the question of whether the prosecution continues—or instead should cease, causing the defendant's release—does not concern the Fourth Amendment. This Court long has made clear that the Fourth Amendment does not grant a criminal defendant a right "to judicial oversight or review of the decision to prosecute." *Gerstein*, 420 U.S. at 119; see *Costello v. United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, * * * is enough to call for trial."); *Albright*, 510 U.S. at 282 (Kennedy, J., concurring in the judgment) (similar).

All of this shows why petitioner has no viable Fourth Amendment claim for detention resulting from "malicious prosecution" beyond "legal process." Pet. i. The initial arrest and probable-cause assessment, though he contends they were flawed, are not subject to challenge here because the limitations period has

expired. See *supra* Part I. With that initial assessment removed from consideration, the Fourth Amendment does not confer a right to release prior to trial or the dismissal of charges. And while petitioner claims that respondents procured and prolonged that prosecution abusively, see *supra* p. 36, the Fourth Amendment does not govern the prosecution's propriety. So petitioner's remedy, if any, lies elsewhere. See, *e.g.*, *Llovet*, 761 F.3d at 762 ("The [Fourth] [A]mendment does not regulate the length of detentions after a judge or magistrate has determined that there is probable cause to detain a person on a criminal charge.").

3. Again, petitioner builds his case on *Gerstein*, contending that "the Fourth Amendment supplies the basis for analyzing allegedly unconstitutional 'detentions of suspects pending trial.'" Pet'r Br. 14 (quoting *Gerstein*, 420 U.S. at 125 n.27). Petitioner reasons that he must have stated a Fourth Amendment violation with his claim that the "criminal proceedings against him * * * result[ed] in his prolonged detention." Pet'r Br. 13. But *Gerstein* did not hold that a potential Fourth Amendment claim arises from every instance of prolonged pretrial detention. *Gerstein* mandated a finding to justify "the *initial decision* to detain an accused" following a warrantless arrest, *Bell*, 441 U.S. at 533–34 (emphasis added), but also established that the Fourth Amendment did not require anything *else* to authorize "detention of suspects pending trial," *Gerstein*, 420 U.S. at 125 n.27; see *supra* p. 36. In fact, *Baker* recognized that a similar "prolonged detention" claim did not arise under the Fourth Amendment. 443 U.S. at 142, 144–45.

Indeed, petitioner's theory proves far too much. While he tries to cabin his claim to prolonged *pretrial* detention, he betrays the logic of his position when he says that anyone who is ever "put in jail is seized from arrest until release." Pet'r Br. 22. Under that rule, as petitioner's amici make explicit, even *post*-conviction detention would violate the Fourth Amendment if there were an objective lack of probable cause at the time of arrest, see, *e.g.*, Alschuler Br. 4, 6–7—for if a grand jury indictment or decision to bind the defendant over following a preliminary hearing do not mark the end of any initial Fourth Amendment seizure, there is no reason why conviction following trial would do so. This would mean that, contrary to settled law, the Fourth Amendment forbids all trial-related misconduct causing or perpetuating the detention of a criminal defendant whom there is no probable cause to detain. The state's failure to disclose exculpatory evidence, a prosecutor's decision to press charges based on retaliatory animus, and the state's suborning perjury all would become Fourth Amendment claims, whereas until now the Court has treated them exclusively as matters of due process. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963); *United States v. Bagley*, 473 U.S. 667, 680 (1985); *United States v. Goodwin*, 457 U.S. 368, 372–73 (1982); *United States v. Augenblick*, 393 U.S. 348, 352–53 (1969). Petitioner fails to address this established law, much less offer any sound basis for upending it.

B. The Due Process Clause Is The Sole Constitutional Home, If One Exists, For Petitioner's Claim.

1. With his initial detention and probable cause finding time-barred, petitioner's claim here is, at

bottom, a challenge to the allegedly abusive prosecution that led to his "prolonged detention." Pet'r Br. 13. His confinement continued because, and only because, respondents allegedly procured "criminal proceedings against him" and avoided the dismissal of those proceedings until May 4, 2011. See *supra* pp. 11-12.

Procedures exist for halting allegedly abusive prosecutions. For instance, a grand jury may refuse to indict, or the court may dismiss charges after a preliminary hearing. See Yale Kamisar *et al.*, *Modern Criminal Procedure* 963, 1013 (13th ed. 2012) (grand juries and preliminary hearings provide "screening of the prosecutor's decision to file felony charges"). A claim, like petitioner's, that a prosecution should have ceased earlier thus alleges *either* that the respondents abused these procedures *or* that additional procedures should have been provided that would have led to the prosecution's termination (and thus the suspect's release).

2. Such claims are quintessential due process issues. Demands for additional procedural safeguards are at the core of due process. *Baker*, 443 U.S. at 145; see *Gerstein*, 420 U.S. at 125 n.27; see also *United States v. Salerno*, 481 U.S. 739, 746, 750 (1987) (procedures for pre-trial bail); *Wolff v. McDonnell*, 418 U.S. 539, 558–59 (1974) (post-conviction discipline); *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972) (public employment).

Likewise, this Court has long recognized that a state violates due process when it turns existing procedures into "a contrivance" "through a deliberate deception" via "the presentation of testimony known to

be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The same is true of all manner of malicious abuses of the state's criminal procedures that effect a deprivation of liberty—including, of particular relevance here, when the state's agents commence or continue criminal proceedings out of "an improper vindictive motive," *Goodwin*, 457 U.S. at 373, 384; see *N. Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (same in sentencing proceedings), or when "bad faith" by police officers results in the destruction of exculpatory evidence, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

In fact, Justice Scalia indicated that one of petitioner's very allegations—the "supposed knowing use of fabricated evidence before the grand jury"—would "state a claim for denial of due process." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) (emphasis omitted) (citing *Mooney*, 294 U.S. at 112); First. Am. Compl. ¶165 & Ex. 2 (J.A. 77, 94–96); Pet. App. A2. Lower courts, too, have recognized that due process governs abusive deprivations of liberty or property stemming from the commencement of prosecution[8]—precisely what petitioner alleges here. Br. of Pl.-Appellant, *supra*, at 3, 5 (ECF No. 16); J.A. 37–38, 62–63, 77.

3. Petitioner could have invoked these principles to challenge the prosecution that resulted in his prolonged detention. But he did not press such a claim, and he

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[8] See, *e.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 585–86 (7th Cir. 2012); *Klen v. City of Loveland*, 661 F.3d 498, 516 (10th Cir. 2011); *Surprenant v. Rivas*, 424 F.3d 5, 15 (1st Cir. 2005); *Devereaux v. Abbey*, 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc); *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000).

cannot transform the Fourth Amendment into a vehicle to do so.

Indeed, petitioner's position is especially untenable insofar as he suggests he retained a live Fourth Amendment claim after these procedures ran their course. If a grand jury or preliminary hearing reaffirms that a prosecution should advance, then any continued detention is plainly the result of *that* proceeding, not the initial seizure. At that point, there is no further relevance to any alleged misrepresentations in connection with "the *initial decision* to detain an accused" pending trial, *Bell*, 441 U.S. at 533–34 (emphasis added), which is the Fourth Amendment's sole concern. See *supra* p. 36.[9]

4. This distinction between the Fourth Amendment and the Due Process Clause accords with lines the Court has often drawn. While a seizure on the street—*i.e.*, an arrest—is a core Fourth Amendment issue, once the prosecution begins, due process governs the adequacy of procedures for release on bail. See *Salerno*, 481 U.S. at 746, 750. Similarly, while the Fourth Amendment governs the manner of the initial detention, the manner of continued detention pending trial—the conditions of confinement, or claims of excessive force—are matters of due process. See *Bell*, 441 U.S. at 535–36. And what is true of a suspect's

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[9] The result might be different if a grand jury indictment had been used to obtain an arrest warrant, which officers then employed to procure a suspect's initial arrest. See, *e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014) (noting that grand jury "indictment triggers 'issuance of an arrest warrant without further inquiry'" (quoting *Gerstein*, 420 U.S. at 117 n.19)). Here, the grand jury hearing came long after petitioner's arrest and *Gerstein* determination. See *supra* pp. 11-12.

liberty holds equally for his property. The initial seizure's legality is a Fourth Amendment question, but when the government seeks to prolong control over assets pending trial under a forfeiture statute, due process provides the standard. *Kaley v. United States*, 134 S. Ct. 1090, 1096 (2014); cf. *id.* at 1098 (commencement of legal process via indictment "eliminates * * * Fourth Amendment" inquiry as to "probable cause to support any detention"). Likewise here, the Fourth Amendment's scope is limited to the initial probable cause assessment; it does not stretch to include the propriety of the ensuing prosecution or alleged corruption of the procedures designed to oversee it.

5. Due process is the only possible home for a constitutional tort that looks anything like common-law malicious prosecution. To be sure, it is by no means clear that a claim with the tort's common-law elements exists as a *constitutional* cause of action under §1983. After all, §1983 is not "simply a federalized amalgamation of pre-existing common-law claims." *Rehberg*, 132 S. Ct. at 1504; see Nahmod, *supra*, §3.63. But due process is the only candidate here.

At a minimum, the Fourth Amendment is incompatible with two elements that characterize the "'distinct' tort of malicious prosecution": favorable termination and malice. *Wallace*, 549 U.S. at 390 (citation omitted); see *supra* Section I.A. Not so with due process. Malicious prosecution's favorable-termination element is at least arguably consistent with a challenge to the integrity of the prosecution itself (rather than a mere challenge to the defendant's seizure). And the integrity of the processes involved in prosecution is the bailiwick of due process. See

California v. Trombetta, 467 U.S. 479, 485 (1984) (due process "ensur[es] the integrity of our criminal justice system"); see, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (due process claimant must show either effect on outcome or "structural defect" in proceeding).

Likewise, malicious prosecution's malice element is incompatible with the Fourth Amendment, see *supra* Section I.A.2, but fits easily with due process, which long has been home to intentional constitutional torts. See, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Paul v. Davis*, 424 U.S. 693, 708–09 (1976). In fact, historically the "guarantee of due process has been applied [only] to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331 (citations omitted).

Similarly, the damages available for a malicious prosecution claim make sense only as part of a due process challenge to the integrity of the prosecution—not merely a challenge to an accompanying confinement. *Wallace* explained that at common law "unlawful detention forms *part of* the damages" for malicious prosecution. 549 U.S. at 390 (emphasis added). But common-law malicious prosecution was a "dignitary tort," 2 Dan B. Dobbs, *The Law of Remedies* §7.1(1) (2d ed. 1993); see 3 William Blackstone, Commentaries *127, which compensated plaintiffs for the broad array of harms attributable to being falsely accused of a crime, including reputational harm and emotional distress, *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149–50 (K.B. 1698); *accord Restatement (Second) of Torts* §§670, 671. Such damages, to the extent

compensable under §1983, make sense only in an action challenging the integrity of a prosecution.[10]

C. The Court Need Not Determine When Petitioner Was First Held Pursuant To The Ongoing Prosecution, But His Initial Appearance Before A Magistrate Is Consistent With Nationwide Criminal Procedure And This Court's Precedent.

1. This case does not require the Court to determine the precise moment when petitioner's detention resulted from the ongoing prosecution, rather than his initial seizure. Petitioner filed his suit more than two years after his arrest, *Gerstein* finding, first appearance, indictment, and arraignment. If any of those points mark the end of a Fourth Amendment claim, that claim is untimely.

But if the Court were to specify a breakpoint—a moment at which a defendant definitively is detained not pursuant to the initial arrest, but because a prosecution has commenced and is ongoing—the obvious point would be the defendant's first appearance

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[10] This line also is consistent with *Albright*. In light of the particular allegations in that case, only Justices Kennedy and Thomas construed Albright's claim as a challenge to his prosecution, and so only these Justices—unlike the plurality and Justice Souter—treated it as a malicious prosecution claim. 510 U.S. at 281 (Kennedy, J., concurring in the judgment). The plurality, Justice Scalia, and Justice Souter likewise all recognized a distinction between a challenge to an initial seizure and a challenge to a prosecution, but because they did not understand Albright to challenge the latter, they did not even call Albright's claim "malicious prosecution." *Id.* at 271 (plurality); *id.* at 275 (Scalia, J., concurring); *id.* at 289–91 (Souter, J., concurring).

before a magistrate. This appearance, otherwise known as the "initial presentment," "preliminary arraignment," or "arraignment on the complaint," stems from the requirement that an "arrestee who is held in custody * * * must be presented before the magistrate court within a time period typically specified as either 24 or 48 hours." Kamisar, *supra*, at 13–14; see also Unif. R. Crim. P. 311(a), (d) (1987); Fed. R. Crim. P. 5(a).

"This first time before a court * * * is generally the hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,' and 'determine[s] the conditions for pretrial release.'" *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199 (2008) (quoting 1 Wayne R. LaFave *et al.*, *Criminal Procedure* §1.4(g) (3d ed. 2007)); see 3 Wayne R. LaFave *et al.*, *Criminal Procedure* §11.2(b) (4th ed. 2015); Kamisar, *supra*, at 13–14. It is also the latest point at which the constitutional right to counsel attaches, for it marks the "point at which the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Rothgery*, 554 U.S. at 198 (internal quotation marks omitted). As in this case, moreover, because it is the moment when bail is set, the first appearance marks a defendant's transition from police custody to detention at the county jail. See *supra* pp. 11-12; see generally Kamisar, *supra*, at 11, 14. At that point petitioner can no longer claim he was detained because of his initial seizure; rather, he then was detained

because the government exercised its discretion to prosecute him.

2. To the extent "malicious prosecution" in *Wallace* refers to a constitutional claim with elements of the common-law tort (by no means a given, see *supra* Section I.C), that decision suggests this very line. The Court in *Wallace* described the initiation of process as the moment when a defendant "is bound over by a magistrate or arraigned on charges," concluding that when the plaintiff "appeared before the examining magistrate" his false imprisonment claim ended and a "malicious prosecution" claim began. 549 U.S. at 389–91. Unlike a warrant hearing or *Gerstein* finding (petitioner's definition of "process," see *supra* Section I.C, *infra* Section II.D), which may occur *ex parte*, an appearance "before the examining magistrate" suggests a first appearance, as does the phrase "arraigned on charges," which mirrors a phrase—"arraignment on the complaint"—that is synonymous with "first appearance." The Seventh Circuit, too, uses the term "arraignment" or "'initial appearance in court'" to describe the transition between false arrest and malicious prosecution, see Pet'r Br. 21; *Llovet*, 761 F.3d at 763 (quoting *Hernandez v. Sheahan*, 455 F.3d 772, 776-77 (7th Cir. 2006)), as does the United States in this case, see U.S. Br. 6 n.8 (recognizing that petitioner was arraigned within Seventh Circuit's meaning when he "had his first appearance on the criminal complaint").

And while *Wallace* also used the phrase "bound over by a magistrate" to describe the transition, this term does not refer to a *Gerstein* hearing, as petitioner implies. See Pet'r Br. 17. Rather, being "bound over" refers to the magistrate's later finding, at a preliminary

hearing, that sufficient evidence exists to proceed with the prosecution or trial.[11] See, *e.g.*, *Albright*, 510 U.S. at 269 (plurality op.); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); see also Kamisar, *supra*, at 1011 (magistrate makes "bindover determination" at preliminary hearing).[12]

D. Petitioner's Counterarguments Fail.

1. Petitioner disregards all of this and contends that a *Gerstein* finding is "process" giving rise to a malicious prosecution claim under *Wallace*. See *supra* Section I.C. But the idea that *Wallace* intended to refer to a *Gerstein* finding (without ever using that term) as triggering a Fourth Amendment malicious

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[11] Nor is there anything to *Wallace*'s reference to the lack of an arrest warrant in that case. See Pet'r Br. 17. At most, this reference recognizes that process could not have commenced because there was not even a warrant. But the Court did not equate issuance of an arrest warrant with the start of legal process. Instead, *Wallace* says legal process comes later, when a defendant "is bound over by a magistrate or arraigned on charges." 549 U.S. at 389.

[12] At common law, courts may have treated a warrant hearing as the starting point of a malicious prosecution claim, see, *e.g.*, *Restatement (Second) of Torts* §654, cmt. c, but this Court need not conform to every particular of the common law, especially when constitutional principle, to say nothing of modern norms of criminal procedure, is to the contrary, *Rehberg*, 132 S. Ct. at 1503. In any event, common-law courts also recognized that malicious prosecution challenges to *ex parte* proceedings did not require the tort plaintiff to prove favorable termination, the one element petitioner must insist upon here. See, *e.g.*, *Fortman v. Rottier*, 8 Ohio St. 548, 551 (1858); *Bump v. Betts*, 19 Wend. 421, 422 (N.Y. Sup. Ct. 1838); *Steward v. Gromett*, 141 Eng. Rep. 788, 793 (Ct. Common Pleas 1859) (opinion of Erle, C.J.).

prosecution claim, *complete with a successful termination element*, is impossible to sustain.

"The sole issue [in a *Gerstein* hearing] is whether there is probable cause for detaining the arrested person *pending further proceedings*." *Gerstein*, 420 U.S. at 120 (emphasis added). As petitioner acknowledges, *Gerstein* hearings differ from criminal prosecutions because they may be non-adversarial, conducted *ex parte*, and resolved entirely on either hearsay evidence or written testimony. Pet'r Br. 20 & n.5. They also differ in that they are not held to further a criminal prosecution, but rather (like warrant hearings) to ensure prompt assessment of probable cause to arrest even while a decision whether to prosecute may remain pending. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that *Gerstein* finding ordinarily must occur within 48 hours). To be sure, in many cases—as in this one—a magistrate will make the *Gerstein* finding at the start of the defendant's first appearance. 3 LaFave, *supra*, §11.2(b). But in such cases, it is not the *Gerstein* finding but what follows—the reading of charges, description of rights, attachment of the Sixth Amendment right to counsel, and bail determination—that mark the initiation of the prosecution.

That does not challenge petitioner's assertion that the questions addressed at a post-arrest *Gerstein* hearing are "'the same' as * * * for the issuance of an arrest warrant." Pet'r Br. 20 (quoting *Gerstein*, 420 U.S. at 120). They *are* the same. They both arise under the Fourth Amendment because they both concern a suspect's initial arrest and detention. Neither recognizes a Fourth Amendment claim for "prolonged detention" following the initial assessment of probable

cause, Pet'r Br. 13; neither addresses the propriety of the prosecution whose maintenance caused that prolonged detention; and neither provides any basis for a malicious prosecution claim with a favorable-termination element—the initial arrest could have been flagrantly unlawful but an ensuing prosecution and conviction perfectly permissible.

2. Petitioner invokes *Burns v. Reed* for its observation that, for purposes of the absolute immunity doctrine as applied to prosecutors, "a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process.'" 500 U.S. 478, 492 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Yet not only did that case address the very different issue of when absolute immunity begins, but it involved a prosecutor's effort to secure a search warrant—and even petitioner does not contend that every request for a search warrant marks the start of a malicious prosecution claim.

3. Finally, petitioner errs when he claims that Justice Scalia's concurrence in *Kalina* suggested that malicious prosecution claims may "be brought against officers who cause illegal detentions pursuant to arrest warrants not supported by probable cause." Pet'r Br. 19 (citing *Kalina*, 522 U.S. at 133–34 (Scalia, J., concurring)). In fact, Justice Scalia noted only that under the common law rule, "[a] private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution." 522 U.S. at 132. Justice Scalia said nothing about whether a tort with the elements of common-law malicious prosecution would be cognizable under §1983 if a police officer procured an arrest warrant without probable cause that resulted in a criminal prosecution.

* * * *

In short, because *Wallace* recognizes a line between false imprisonment and malicious prosecution claims that falls *after* the *Gerstein* finding, petitioner is wrong to argue—as he does throughout his brief—that misstatements in support of a *Gerstein* finding support a Fourth Amendment claim for malicious prosecution. In fact, those are Fourth Amendment claims that, as *Wallace* holds, accrue when the (malicious) prosecution begins. Again, however, even if *Wallace* actually intended to announce a new "malicious prosecution" tort based on an adverse *Gerstein* finding—so that two Fourth Amendment torts with different elements (false arrest and malicious prosecution) sit back to back—the latter, process-based tort would lack the common-law element petitioner needs to prevail. See *supra* Part I.

All of this is in step with the Seventh Circuit's holding below, which does not suggest that falsehoods at a *Gerstein* hearing are not actionable misconduct under the Fourth Amendment. J.A. 103. Indeed, the parties never so much as cited *Gerstein* in their appellate briefs. That court merely recognized, consistent with its precedent, that "[r]elabeling a fourth amendment claim as a 'malicious prosecution' [does] not extend the statute of limitations." *Newsome*, 256 F.3d at 751. Because petitioner waited more than two years after his arrest and probable cause finding to file his complaint, he could not overcome the time bar by calling his Fourth Amendment claim "malicious prosecution." If petitioner wanted to challenge his ongoing detention, he needed to do so under the Due Process Clause.

E. There Are Advantages To Favoring State Law As A Source Of Malicious Prosecution Claims.

Because petitioner disavows any desire to assert a claim under the Due Process Clause, this Court need not resolve how the rule of *Parratt*, 451 U.S. 527, which applies when the conduct of a government official is random and unauthorized, would impact such a hypothetical claim. See Pet'r Br. 33 (asserting that if malicious prosecution is governed by due process, "it would not necessarily follow that *Parratt*[] * * * would apply in this setting"). But when a procedural due process tort is potentially subject to *Parratt*, it encourages robust state-law remedies. Accordingly, recognizing that a §1983 claim for malicious prosecution sounds, if at all, in the Due Process Clause would have the salutary effect of encouraging further development of state remedies for malicious prosecution.

Under *Parratt*, procedural due process does not require pre-deprivation procedures to protect a constitutional interest (here, liberty) if the deprivation results from a random and unauthorized act (here, the alleged falsification of evidence) when state law provides adequate post-deprivation process (here, a state-law malicious prosecution tort). See *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Accordingly, state actors are subject to federal claims under §1983 only when the state's remedies are inadequate. See *Julian v. Hanna*, 732 F.3d 842, 846–48 (7th Cir. 2013) (holding

that Indiana has not adopted an adequate malicious prosecution remedy).[13]

For a procedural due process tort, therefore, the States, rather than §1983, serve as the primary sources of substantive law. That means there are no "uncertainties" over what process is "due" when *Parratt* applies, Pet'r Br. 30—the process due is the process provided for by state law, so long as that law is constitutionally adequate. The Federal Constitution thus serves as a floor, rather than a ceiling, on the protection of individual rights.

Presently, state experimentation with the elements of common-law malicious prosecution occurs principally over the favorable-termination element. See generally *Cordova*, 816 F.3d at 664 (Gorsuch, J., concurring in the judgment). Some states treat this element as requiring that the termination of criminal proceedings indicates innocence. *Miles v. Paul Mook of Ridgeland, Inc.*, 113 So. 3d 580 (Miss. Ct. App. 2012). Others view it as requiring only that the criminal prosecution be dismissed, even by a *nolle prosequi*. *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 426 (D. Del. 2013). This experimentation is beneficial and permits states to account for variations in their criminal practice and procedure.

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[13] For this reason, the argument by one of petitioner's amici that §1983 malicious prosecution cannot be a procedural due process tort because "there is no limit on a state's ability to immunize its own officers" is misguided. Br. of Nat'l Police Accountability Project as Amicus Curiae in Support of Petitioner 11. As the Seventh Circuit has held, *Parratt* does not apply, and a federal remedy exists, when state law immunizes law enforcement personnel from malicious prosecution liability. *Julian*, 732 F.3d at 846–48.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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ELIJAH MANUEL,

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v.

CITY OF JOLIET ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

When the police arrest someone without a warrant, there are two distinct periods of pretrial detention that may follow: (1) the day or two between the arrest and the initiation of legal process; and (2) the weeks or months between the initiation of legal process and dismissal or trial. This case is about the second period of time. Petitioner contends his Fourth Amendment rights were violated because he was unreasonably incarcerated between the initiation of legal process and the dismissal of the charges against him. Petr. Br. 13; J.A. 79.

Respondents argue this claim must be dismissed because petitioner calls it a "malicious prosecution" claim, and the Fourth Amendment does not embrace every element of the common-law tort of malicious prosecution. But the label "malicious prosecution" is just "shorthand." *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996); *see also* Petr. Br. 13. This Court has used the phrase "Fourth Amendment malicious-prosecution suit" to reference a claim under 42 U.S.C. § 1983 alleging "unlawful detention" after the "wrongful institution of legal process." *Wallace v. Kato*, 549 U.S. 384, 390 & n.2 (2007) (emphasis omitted); *see also Albright v. Oliver*, 510 U.S. 266, 270 n.4, 275 (1994) (plurality opinion). That is what petitioner alleges.

In other words, the label "malicious prosecution" simply differentiates a claim covering the second time period described above (pretrial detention *following* legal process) from a claim involving the first period (detention *preceding* legal process)—the latter of which is sometimes called "false arrest" or "false imprisonment." *See Wallace*, 549 U.S. at 388-

90. The label also dictates when a claim accrues because claims under Section 1983 accrue when their closest common-law counterpart would have. *See id.* But labeling a Fourth Amendment claim covering the second period of time as a "malicious prosecution" claim does not require the Fourth Amendment itself to encompass every element of the common-law tort of malicious prosecution.

Once the relevance of labeling is clarified, this case becomes straightforward. A plaintiff bringing a claim under Section 1983 must do two distinct things: (1) allege a cognizable constitutional violation; and (2) satisfy any additional statutory requirement Section 1983 imposes. Petitioner does both. First, he alleges a violation of the Fourth Amendment inasmuch as he was detained without probable cause to believe he committed any crime for forty-eight days between his first appearance and the dismissal of the State's baseless charges. Second, petitioner has satisfied Section 1983's statutory requirement that plaintiffs challenging detention imposed pursuant to legal process show that "criminal proceedings have terminated in [their] favor." *Heck v. Humphrey*, 512 U.S. 477, 489 (1994); *see also Albright*, 510 U.S. at 280 (Ginsburg, J., concurring). Petitioner alleges such termination, and he filed his complaint within the applicable limitations period of that occurrence.

It is irrelevant whether the Due Process Clause under these circumstances also provides some basis for recovery. Petitioner has alleged a cognizable Fourth Amendment claim. If it did matter, though, the Fourth Amendment is a better fit for the harms at issue here and thus would trump.

ARGUMENT

For all of respondents' talk about timeliness, this case is simply about whether the Fourth Amendment supports a claim under Section 1983 for unlawful detention between the initiation of legal process and dismissal. If so, then the court of appeals must be reversed and this case must be allowed to proceed. If not, then petitioner's Fourth Amendment "malicious prosecution" claim would have had to be dismissed regardless of when it was filed. For the reasons petitioner now explains, the Fourth Amendment supports petitioner's claim.

I. The Fourth Amendment Supports "Malicious Prosecution" Claims Arising from Pretrial Detention

The Fourth Amendment, by its plain terms, applies to detentions between the initiation of legal process and trial. And nothing about the relationship between a Fourth Amendment claim based on such a detention and the common-law tort of malicious prosecution precludes petitioner from seeking relief here under Section 1983.

A. The Fourth Amendment's Protections Do Not Evaporate During the Period Between the Initiation of Legal Process and Trial

Respondents advance two reasons why the Fourth Amendment purportedly does not apply to detentions between the initiation of legal process and trial. First, respondents assert that a "seizure" is a discrete act, which ends "no later than when the *Gerstein* hearing blesses it." Resp. Br. 30. Second, respondents contend that even if a detainee continues

to be "seized" after a *Gerstein* hearing, the continued pretrial seizure does not implicate the Fourth Amendment because it "is due to the prosecution, rather than the initial arrest and probable-cause finding." Resp. Br. 38. Neither argument withstands scrutiny.

1. This Court has made clear that a person is seized whenever "his freedom of movement is restrained" such that he is "not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion); *accord Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). It is thus self-evident that when a person is kept in a jail cell, he is seized.

Quoting *California v. Hodari D.*, 499 U.S. 621, 625 (1991), respondents protest that a seizure accompanying an arrest is necessarily "a single act, and not a continuous fact." Resp. Br. 30. But nothing in *Hodari D.* indicates that an incarcerated person at some point ceases to be seized. The Court there simply observed that a person who flees police custody is not seized "during the period of fugitivity." 499 U.S. at 625. When, by contrast, a person remains "within physical control" of the authorities (detained in a jail cell or otherwise), *Hodari D.* confirms the person is seized. *Id.* at 624; *see also id.* at 627-28 (reaffirming *Mendenhall* test).

No other conception of the term "seizure" would make sense. "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *see also Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (Fourth Amendment governs "the detention of suspects pending trial"). The Amendment could not

accomplish that objective if only the first day or two of pretrial confinement were subject to its regulation. The purpose of a *Gerstein* finding, in other words, is to govern the legality of an "extended" pretrial detention going forward, not to retroactively assess the legality of a warrantless arrest. *Gerstein*, 420 U.S. at 114; *see also id.* at 127 (Stewart, J., concurring) (*Gerstein* "does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person" pending trial).

Nor could the Fourth Amendment serve its goal of steering officers toward securing warrants before arrests if it applied in the context of warrantless arrests only for the day or two before legal process commenced. This Court noted in *Wallace v. Kato*, 549 U.S. 384, 389 (2007), that the issuance of a warrant initiates "legal process." And under *Malley v. Briggs*, 475 U.S. 335 (1986), the Fourth Amendment governs pretrial detentions (which can last weeks or months) following the initiation of that legal process. The Fourth Amendment should apply no differently when arrest *precedes* the initiation of legal process. If anything, the Fourth Amendment's protections are more important in that context. *See* Petr. Br. 24-25; Albert W. Alschuler Br. 26-30, 34-35.

Respondents' only rejoinder is an assertion that *Wallace*, in actuality, "did not equate issuance of an arrest warrant with the start of legal process." Resp. Br. 49 n.11. But *Wallace* speaks for itself. It noted that the case involved detention "*without legal process* in January 1994. [The police] did not have a warrant for [Wallace's] arrest." 549 U.S. at 389; *see also Cook v. Hart*, 146 U.S. 183, 191 (1892) (discussing an arrest "without warrant or other legal

process"). There is no denying, therefore, that a demonstration of probable cause to a magistrate in the context of a warrant application constitutes the initiation of legal process. And that being so, the same must be true of a demonstration of probable cause to a magistrate in the context of a *Gerstein* hearing. *See, e.g.*, *Wilkins v. DeReyes*, 528 F.3d 790, 798-99 (10th Cir. 2008).

2. Respondents' alternative argument for why the Fourth Amendment's protections evaporate after the initiation of legal process fares no better. Respondents maintain that even if a detainee remains "seized" following the initiation of legal process, "[t]he defendant remains detained only because the prosecution continues." Resp. Br. 38.

Insofar as this is a causation argument, petitioner has already explained why the argument does not render the Fourth Amendment inapplicable and lacks merit in any event. Petr. Br. 23-24. In short, a judicial finding of probable cause does not "break[] the causal chain" between a police officer's misrepresentations and the defendant's detention. *Malley*, 475 U.S. at 344 n.7. Officers are responsible under Section 1983 "for the natural consequences of [their] actions." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). And because *Gerstein* findings in Will County and elsewhere are made in nonadversarial proceedings that typically turn entirely on police officers' renditions of the facts, *see* Petr. Br. 20-21; Resp. Br. 50-51, it naturally follows that making misrepresentations in connection with

such proceedings will result in suspects being wrongfully detained, *see* Petr. Br. 23-24.[1]

Insofar as respondents suggest that when a pretrial detainee's "initial seizure is not at issue, there is no Fourth Amendment right to be released" when probable cause is lacking, Resp. Br. 36, they are equally mistaken. Respondents contend *Baker v. McCollan*, 443 U.S. 137 (1979), "recognized this principle." Resp. Br. 37. But *Baker* holds nothing of the sort. The Court there merely concluded that once a person is jailed pending trial based on a *proper and accurate* demonstration of probable cause to a magistrate, the Fourth Amendment requires nothing more. *Baker*, 443 U.S. at 143-46. The Court said nothing about the situation here: detention following an *illegitimate* demonstration of probable cause. In this situation, the Fourth Amendment requires the detainee to be "discharged from custody," for there is no basis for holding him. *Gerstein*, 420 U.S. at 115.

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[1] The National District Attorney's Association (NDAA) contends that findings at preliminary hearings should cut off officer liability because such hearings "are fully adversarial, generally allowing the defendant to cross-examine the prosecution's witnesses and to put on his own." NDAA Br. 17. But as the Solicitor General explains, such enhanced pretrial hearings do not necessarily sever the "causal link" connecting an officer's malfeasance and a defendant's continued detention. U.S. Br. 14-16. At any rate, no such hearing was held here. The only hearing held between petitioner's *Gerstein* hearing and his release was the grand jury proceeding. As petitioner has explained (and respondents do not dispute), this proceeding was not meaningfully different than the *Gerstein* hearing. *See* Petr. Br. 5, 24 n.8.

Respondents protest that treating the Fourth Amendment as applicable throughout the pretrial process "proves far too much" because it implies that the Fourth Amendment continues to apply beyond conviction as well. Resp. Br. 40. But the situation following a conviction is markedly different. While defendants who are convicted may remain seized, their convictions—supported, as they must be, by findings beyond a reasonable doubt—render the seizures indisputably valid so long as the convictions are in place. Put another way, "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protections solely over the *pretrial* events of a prosecution." *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc) (emphasis added).

B. The Common-Law Elements of Malicious Prosecution Do Not Stand in the Way of Applying the Fourth Amendment to Pretrial Detention

Respondents next argue the Fourth Amendment cannot support petitioner's claim "because favorable termination and malice, two of the four common-law elements [of a malicious prosecution claim], are irreconcilable with bedrock Fourth Amendment law." Resp. Br. 19. Respondents are correct that the Fourth Amendment itself imposes neither element here. But respondents overlook that Section 1983—the statutory platform for petitioner's claim—imposes the favorable termination requirement. And Section 1983's requirement that a plaintiff overcome any assertion of qualified immunity operates much like the common-law element of malice.

1. As the United States and several courts of appeals have explained, Section 1983 requires a

plaintiff bringing a Fourth Amendment claim alleging unreasonable pretrial detention to prove that the criminal prosecution giving rise to the detention was resolved in the plaintiff's favor. U.S. Br. 19 & n.13, 24 n.16; *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010); *Lambert v. Williams*, 223 F.3d 257, 262 & n.3 (4th Cir. 2000); *Whiting v. Traylor*, 85 F.3d 581, 585-86 (11th Cir. 1996); *see also Albright*, 510 U.S. at 280 (Ginsburg, J., concurring).

Section 1983 requires courts to borrow accrual rules from the common-law tort that provides the "closest analogy" to the constitutional claim at issue. *Wallace*, 549 U.S. at 388 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). In *Wallace*, this Court explained that a claim, as here, for unlawful detention between the initiation of legal process and trial most closely resembles the "tort of malicious prosecution." *Id.* at 390. After all, when the pretrial detention was condoned through legal process, a challenge to detention is tied to the legitimacy of the prosecution. And "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484.

Respondents point to a different passage in *Wallace* they say dictates that the favorable termination prerequisite to bringing a Section 1983 claim "applies only in the face of 'an outstanding criminal judgment'" of conviction—a holding that would exclude any claim involving pretrial detention. Resp. Br. 23 (quoting *Wallace*, 549 U.S. at 393 (internal quotation marks omitted)). But that part of *Wallace* concerned whether to extend a favorable termination requirement to claims that the police

wrongfully detained the plaintiff *before* the initiation of any legal process. *Wallace*, 549 U.S. at 393-94. The closest tort analogy to such claims is false imprisonment, not malicious prosecution. *Id.* at 389. And the tort of false imprisonment does not have a favorable termination element; indeed, a false imprisonment claim can be brought regardless of whether a state criminal prosecution ever occurs. *Id.* at 393.[2] Fourth Amendment false imprisonment claims are thus "entirely distinct" from claims, as here, for wrongful detention *following* the initiation of legal process—claims *Wallace* itself characterized as "malicious prosecution" claims. *Id.* at 390 (quotation marks and citation omitted).

Even if the question whether the favorable termination rule applies to Section 1983 claims challenging pretrial detention following the initiation of legal process were an open one, there would be every reason to apply the rule here. In *Heck*, this Court reaffirmed that Section 1983 cannot be used directly to challenge "the fact or duration" of confinement due to a criminal conviction; only criminal appeals or habeas petitions may do that. 512 U.S. at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973)). *Heck* thus held that even when a Section 1983 plaintiff seeks only damages, a showing of favorable termination is necessary to "avoid[] parallel litigation" and potentially "conflicting resolutions" over the issue of guilt. *Id.* at

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[2] The same is true with respect to a claim for "an allegedly unreasonable search," *Heck*, 512 U.S. at 487 n.7—the other type of claim respondents unsuccessfully try to compare to this case. *See* Resp. Br. 22-24.

484 (quotation marks and citation omitted). The favorable termination element also restricts lawsuits alleging unlawful confinement imposed pursuant to legal process to those where there is no valid conviction—and, thus, to cases with claimants potentially deserving of recovering damages. *Id.*

The same reasoning applies here. This Court has already held that a detainee cannot use Section 1983 directly to seek relief from "imprison[ment] prior to trial on account of a defective indictment against him." *Preiser*, 411 U.S. at 486. If plaintiffs could bring Section 1983 damages claims asserting unreasonable pretrial detention while underlying criminal prosecutions were still underway, federal courts would similarly have to assess whether state courts in those pending cases had properly found probable cause. If the federal court were to find probable cause lacking, it would thereby call the ongoing detentions—indeed, the viability of ongoing state prosecutions themselves—into doubt. This would create significant federal/state friction. Furthermore, a Section 1983 suit challenging pretrial confinement in the face of a subsequent conviction would contravene the common-law rule that a conviction is "conclusive of probable cause." Thomas Cooley, Law of Torts 185 (1879); *see also* Stuart M. Speiser et al., 8 The American Law of Torts § 28:5, at 24 (1991) ("[A] conviction is sufficient to negate the element of a lack of probable cause.").

Respondents lastly argue that applying the common law's favorable termination rule here would "*under-serve* the Fourth Amendment's protections" because individuals detained pursuant to legal process without probable cause "should be able to

recover for Fourth Amendment violations, regardless of whether they are ultimately convicted of a crime." Resp. Br. 24. Petitioner was not convicted of any crime related to the charges here, and respondents point to no other case that has ever been brought along the lines they describe. So there is no good reason for this Court to opine regarding the availability of any Section 1983 suit in that hypothetical situation.

At any rate, it is questionable whether any such suit would lie. It is an "established rule" that once convicted at trial, an illegal pretrial detention becomes constitutionally irrelevant—at least for purposes of seeking relief from the conviction. *Gerstein*, 420 U.S. at 119 (citing *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886)). And as noted earlier, the common law at the time Section 1983 was enacted withheld any remedy in this situation as well. *See supra* at 11. Accordingly, this Court would be on solid ground holding in a future case that a person convicted of a crime may not bring a Fourth Amendment claim under Section 1983 for unlawful pretrial detention unless his conviction has been overturned.[3]

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[3] If, however, this Court wished to construe Section 1983 to permit the recovery of damages where the common law would have prevented it, that pathway would be open too. The Court could suspend the favorable termination rule in a case (if ever brought) where the plaintiff conceded that evidence introduced at trial beyond that which allegedly supported his pretrial detention validated his conviction. In that scenario, a holding that probable cause was lacking before trial would not impugn the conviction. *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

2. Respondents and amici on both sides are correct that a plaintiff bringing a Fourth Amendment claim for unreasonable pretrial detention need not allege malice. Malice, or improper purpose, is a subjective concept generally alien to this Court's Fourth Amendment jurisprudence. *See* Resp. Br. 26-27; NACDL Br. 21-23; Illinois Br. 8-10. But that fact has no import here. It is well settled that a constitutional tort need not incorporate every element of a common-law tort. *See, e.g., Rehberg v. Paulk*, 132 S. Ct. 1497, 1504-05 (2012); *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985).

The Solicitor General nevertheless maintains that a plaintiff in petitioner's position must prove the related fact that "the defendant officers acted with intent to deceive or with reckless disregard for the absence of probable cause." U.S. Br. 25. The Government says this requirement springs not from the common law but rather from *Franks v. Delaware*, 438 U.S. 154 (1978). *See* U.S. Br. 27-29. But *Franks* derived its bad faith requirement from the dictates of the exclusionary rule, which concern not whether the Fourth Amendment was violated but whether "a Fourth Amendment violation has been substantial and deliberate." 438 U.S. at 165, 171; *see also, e.g., Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016) (exclusionary rule turns on "purpose and flagrancy of the official misconduct" (quoting *Brown v. Illinois*, 422 U.S. 590, 604 (1975))); *Davis v. United States*, 564 U.S. 229, 236-39 (2011) (stressing that test for applying exclusionary rule is much more stringent than whether Fourth Amendment itself was violated). The exclusionary rule is obviously not in play in Section 1983 litigation. That is why this Court in *Malley*—while holding that the Fourth

Amendment supports claims under Section 1983 for unlawful detention imposed pursuant to legal process in the form of arrest warrants—made no mention of *Franks*. *See Malley*, 475 U.S. at 345.[4]

All that said, the absence of any requirement that a Section 1983 plaintiff challenging his pretrial detention under the Fourth Amendment prove malice or bad faith will not make much practical difference in the mine run of cases—and certainly makes no difference here. That is because Section 1983 requires plaintiffs in these Fourth Amendment cases—as in all other cases against police officers—to overcome any assertion of qualified immunity. *See* NACDL Br. 18-19. To do so, plaintiffs must show that "no reasonably competent officer would have concluded" that probable cause existed. *Malley*, 475 U.S. at 341. This formula serves the same goal as the common-law malice requirement, *id.*, and it is "analogous" (indeed, virtually identical) to what the exclusionary rule requires when a magistrate accepts a police officer's representation that probable cause existed, *id.* at 345; *compare United States v. Leon*, 468 U.S. 897, 922-23 & n.23 (1984). The qualified immunity defense also "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

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[4] Even if a bad faith requirement did apply here, petitioner has sufficiently alleged such malfeasance. *See* J.A. 69-71.

II. The Due Process Clause Is Not a Better Foundation for Grounding "Malicious Prosecution" Claims Arising from Pretrial Detention

Respondents contend that instead of grounding claims such as these in unlawful pretrial detention, it would be better if pretrial "malicious prosecution" claims were treated as claims "that a prosecution should have ended earlier." Resp. Br. 41. And because "the Fourth Amendment does not grant a criminal defendant a right 'to judicial oversight or review of the decision to prosecute,'" respondents argue such claims must be housed, if at all, under the Due Process Clause. *Id.* 38 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)). Respondents' suggestions are misguided.

1. If there is any clear message from this Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994), it is that when a plaintiff alleging "malicious prosecution" under Section 1983 "was not merely charged" with a crime but was seized before trial, "it is the Fourth Amendment" under which his claim "must be judged." *Id.* at 271, 274 (plurality opinion); *see also id.* at 276-79 (Ginsburg, J., concurring). Justice Kennedy was more willing than the majority to entertain such a claim in due process terms. But he also agreed that insofar as the plaintiff chooses—as petitioner does here—to ground his claim in an allegation of detention without probable cause, the claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." *Id.* at 281 (Kennedy, J., concurring in the judgment). That is why nearly every circuit besides the Seventh has long understood

that claims like petitioner's are properly grounded in the Fourth Amendment. *See* Petr. Br. 8 n.4 (citing cases).

Respondents' argument that petitioner's claim must be conceptualized as challenging "the propriety of the prosecution," Resp. Br. 51, instead of the lawfulness of his detention, barely so much as mentions *Albright*. In a lone footnote, respondents suggest the Court did not conceive of Albright's claim "as a malicious prosecution claim." Resp. Br. 46 n.10. But the court below had characterized it that way. *See Albright v. Oliver*, 975 F.2d 343, 347 (7th Cir. 1992) (holding that "malicious prosecution is not actionable as a constitutional tort"). So did Albright himself. *See* Petr. Br. 13, *Albright v. Oliver*, 510 U.S. 266 (1994) (No. 92-833) (likening claim to "an action for malicious prosecution"). The *Albright* plurality did too. *See* 510 U.S. at 270 n.4. And this Court later explained that a claim like Albright's should be viewed as "a Fourth Amendment malicious-prosecution suit under § 1983." *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007).

It is hard to imagine more definitive guidance—at least as to whether claims such as Albright's and petitioner's should be viewed as "malicious prosecution" claims and analyzed under the Fourth Amendment.

2. None of this is to argue categorically that a pretrial detainee may never invoke the Due Process Clause to challenge "the propriety of [a] prosecution," Resp. Br. 51. Petitioner has not advanced such a claim and has no stake in its viability. *See* Petr. Br. 26. Petitioner's point is merely that if this Court needed to choose between the Fourth Amendment

and the Due Process Clause as the basis for bringing "malicious prosecution" claims arising from pretrial seizures, the Fourth Amendment would plainly be the proper choice.

It bears repeating once more that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright*, 510 U.S. at 274 (plurality opinion); *see also Gerstein*, 420 U.S. at 125 n.27 ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for . the detention of suspects pending trial."). And as petitioner has explained in his opening brief and in Part I above, the Fourth Amendment provides well-established and easily administrable standards for adjudicating claims challenging the legality of pretrial detentions.

Shoehorning all such claims into the Due Process Clause, by contrast, would open up a Pandora's box of questions. If "at some juncture following an initial seizure, a criminal defendant's continued pretrial detention is due to the prosecution, rather than the initial arrest and probable-cause finding," Resp. Br. 38, it would first become necessary—as respondents recognize—to pinpoint where this constitutional transition occurs, *id.* 46-49. Respondents suggest the proper transition from the Fourth Amendment to due process would be "the defendant's first appearance before a magistrate," where the government must "commit[] itself to prosecute." *Id.* 46-47 (quotation marks and citation omitted). Yet if that is the case, one wonders why this Court suggested in *Gerstein*

that Fourth Amendment probable-cause determinations be made "at the suspect's first appearance before a judicial officer," 420 U.S. at 123, or why "many" jurisdictions today in fact require *Gerstein* findings at such hearings, NDAA Br. 6. If the Due Process Clause takes over the regulation of pretrial detentions once charges are recited at a first appearance, there is no work for the Fourth Amendment to do at such hearings. Contrary to this Court's directives and decades of settled practice, there would be no need under respondents' theory for magistrates at first appearances ever to make *Gerstein* findings.[5]

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[5] This case illustrates the point. According to the state-court docket sheet, the magistrate at petitioner's first appearance began by reciting the charge against him. Pet. Br. 5. If respondents are correct that the Due Process Clause took over at that point, there was no need for the magistrate to make any *Gerstein* finding, for the Fourth Amendment had ceased to apply once the hearing began. Put another way, if respondents' theory is correct, petitioner *never* had a viable Fourth Amendment claim to challenge his detention pursuant to the *Gerstein* finding because the Due Process Clause had taken over the regulation of his detention by that point anyway.

The same is true with respect to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The County there "provide[d] probable cause determinations at arraignment for all persons arrested without a warrant," usually within 48 hours. *Id.* at 48. If respondents are correct that the Due Process Clause takes over once an arraignment is held, then there would have been no need for *Gerstein* findings at all during such hearings, and it is a mystery why this Court thought the hearings had to comply with the Fourth Amendment. *See id.* at 58-59.

What is more, if the Due Process Clause governs the legality of pretrial detentions beyond first appearances, then this Court will have to devise procedural safeguards and a standard of proof to govern such detentions. Respondents never offer any such methodologies, and there is no guarantee they would track those described in *Gertstein*. The nonadversarial procedures and probable cause standard described in *Gerstein* derive from the Fourth Amendment, *see* 420 U.S. at 120-21—the very provision respondents say does not apply. The Due Process Clause, by contrast, directs federal courts regulating state criminal procedure to consult not only tradition but also their own conceptions of "fundamental fairness." *Medina v. California*, 505 U.S. 437, 448 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); *see also* Petr. Br. 30.

Under that test, the Constitution may well require at least some measure of adversarial process and magistrates to make some heightened finding—perhaps that it is more likely than not that the defendant will be found guilty—to justify prolonged detention pending trial. *See* Petr. Br. 30 n.9; *cf. Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996) (Due Process Clause prohibits criminal defendants from standing trial if they are "more likely than not incompetent"). After all, the "root requirement" of due process is a meaningful opportunity to be heard before being deprived of a liberty interest, *Boddie v. Connecticut*, 401 U.S. 371, 329 (1971), and the harms that flow from erroneous deprivations of liberty in this context are quite profound, *see* Nat'l Ass'n for Public Defense Br. 3-8.

Finally, if a challenge to the legality of pretrial detention is necessarily a challenge to "the propriety of the prosecution," then identifying the proper defendants for such claims would become troublesome. The most natural defendants would seem to be the prosecutors who worked on the case. *See Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). But prosecutors are absolutely immune for the actions of "initiating and pursuing a criminal prosecution." *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976). So unless someone besides prosecutors could be sued under the due process cause of action respondents imagine, respondents' argument is just a thinly veiled way of saying Section 1983 provides no relief whatsoever for unlawful pretrial detention. Could police officers be sued instead? Respondents never say, and the issue would be sure to perplex the lower courts, leading to contentious and extended litigation at the outset of every malicious prosecution case.[6]

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[6] As petitioner has noted, requiring all Section 1983 claims alleging unlawful pretrial detention to be grounded in the Due Process Clause would also require this Court to discern whether and how the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), applies in this context. As petitioner has explained, that rule should seemingly not apply because states already can and do provide hearings before detaining persons on criminal charges. Petr. Br. 33; *see also Albright*, 510 U.S. at 314 (Stevens, J., dissenting). On the other hand, if—as respondents seem to suggest (but never explicitly say), *see* Resp. Br. 53-54—*Parratt* would apply, then the basis for that holding would have to be that it is not "practicable for the State to provide a predeprivation hearing," *Parratt*, 451 U.S. at 543, before such detaining of suspects pending trial. *See also Zinermon v. Burch*,

* * *

At bottom, this is not a hard case. Petitioner has alleged exactly the type of claim this Court in *Albright* and *Wallace* indicated should be brought to seek damages for unreasonable detention between the commencement of legal process and trial. He also filed that claim in a timely manner—within two years of the favorable termination of the criminal case against him. Petr. Br. 9. Indeed, virtually every federal court of appeals besides the Seventh Circuit has long determined that claims like petitioner's are viable. This Court should require the Seventh Circuit to follow the same basic rules everyone else already does.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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494 U.S. 113, 129 (1990). That would be a puzzling pronouncement in light of decades of experience to the contrary, and it would seemingly suggest that jurisdictions would no longer need to provide any contemporaneous means of challenging pretrial confinement.

Respectfully submitted,

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No. 14-9496

In the Supreme Court of the United States

ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ILLINOIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner may bring a Fourth Amendment claim, pursuant to 42 U.S.C. 1983, seeking damages for his pretrial detention pursuant to criminal process where no probable cause existed because the criminal charge was predicated on deliberately fabricated evidence.

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INTEREST OF THE UNITED STATES

The United States detains individuals awaiting criminal prosecutions and thus has a substantial interest in the scope of constitutional rights affecting such detention.

The United States also has a substantial interest in the circumstances in which federal officers can be liable in civil actions for alleged violations of constitutional rights and in the rules of pleading and proof for such suits. Although this case involves a claim against state officers under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The United States prosecutes government employees and officials—mostly state and local law-

enforcement officers—who willfully violate individuals' constitutional rights under color of law, in violation of 18 U.S.C. 241 and 242. The United States also brings civil actions against state and local law-enforcement agencies under 42 U.S.C. 14141, which authorizes the Attorney General to seek appropriate relief to remedy a pattern or practice of law enforcement officers' violations of constitutional rights. Accordingly, the United States has a strong interest in ensuring that these rights are carefully safeguarded and clearly defined.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

Section 1983 of Title 42 of the United States Code provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. On March 18, 2011, during a traffic stop, respondent police officers for the City of Joliet, Illinois, arrested petitioner for possession of ecstasy, a controlled substance, after discovering a bottle of pills during a pat down. First Am. Compl. ¶¶ 20-24 (J.A. 62, 64). According to the allegations in the complaint, the bottle contained only vitamins, and the officers at the scene conducted a field test that showed that the pills did not contain any controlled substances.[1] *Id.* ¶¶ 38, 112-113 (J.A. 64, 69). Although the officers knew the negative field-test results, petitioner was arrested anyway. *Id.* ¶¶ 114-117 (J.A. 69-70). Back at the police station, another officer again tested the seized bottle of pills and again found that the pills were not ecstasy or any other controlled substance. *Id.* ¶¶ 121-122 (J.A. 70-71). The police reports nonetheless stated that the officers knew from their "training and experience" that the pills seized from petitioner were ecstasy; the reports further stated that an evidence technician tested the pills and the result was positive for ecstasy. J.A. 91-92.

Later that same day, a City of Joliet police officer swore out a criminal complaint charging petitioner with unlawful possession of methylenedioxymethamphetamine (ecstasy), a controlled substance, in violation of the Illinois Controlled Substances Act, 720 Ill. Comp. Stat. 570/402(c) (2010).[2] See J.A. 57. Petition-

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[1] Because the case comes to this Court on an appeal from the district court's order granting respondent's motion to dismiss, the complaint's factual allegations must be taken as true. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

[2] Illinois law requires that, within 48 hours of arrest, an arrestee be brought before a judge who will determine whether probable

er remained in jail following his arrest. First Am. Compl. ¶¶ 132, 139 (J.A. 72).

On March 31, 2011, one of the respondent police officers testified to the positive ecstasy test result during grand jury proceedings. J.A. 93-96 (grand jury minutes). That same day, the grand jury returned an indictment charging petitioner with unlawful possession of a controlled substance. J.A. 54-55.

On April 1, 2011, the drug laboratory issued a report that the pills seized from petitioner were not ecstasy and that they contained no controlled substances. J.A. 51. Petitioner was nonetheless arraigned on April 8, 2011, and the drug charge against him was not dismissed until May 4, 2011. Pet. App. A2; see J.A. 48 (court order dismissing the drug charge). Petitioner was released the next day. Pet. App. A2. In all, petitioner was detained for some 48 days, from the date of his traffic stop and arrest (March 18, 2011) until the day after charges were dismissed (May 5, 2011).

2. On April 10, 2013, petitioner instituted this action pro se under 42 U.S.C. 1983 against the City of Joliet and various City of Joliet police officers. Petitioner alleged, *inter alia*, that the officers violated his Fourth Amendment rights by arresting him without probable cause, by searching his car without probable cause, and by using excessive force in carrying out the arrest. Petitioner further alleged that the officers "falsely imprison[ed] [him] beyond a preliminary hear-

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cause exists for the arrest and ensure that the defendant is provided a copy of the charges and advised of his right to counsel. See 725 Ill. Comp. Stat. 5/109-1 (2010); *People* v. *Williams*, 230 Ill. App. 3d 761 (1st Dist. 1992). An initial bail determination is also made at that time. 725 Ill. Comp. Stat. 5/109-1(b)(4) (2010).

ing," First Am. Compl. ¶ 165 (J.A. 77), and unlawfully "continue[d] detaining him in police custody," even though there "was no probable cause" to do so, *id.* at ¶¶ 174, 179 (J.A. 79-80).[3]

3. The district court dismissed petitioner's claims. Pet. App. B1-B3. The court held that the applicable two-year statute of limitations barred petitioner's false arrest and excessive force claims relating to the arrest itself. Those claims accrued on March 18, 2011 (the day of petitioner's arrest), at the time of petitioner's initial appearance on the criminal complaint, see *Wallace* v. *Kato*, 549 U.S. 384, 388-390 (2007), and petitioner waited more than two years after that date to file his civil complaint in district court. Pet. App. B1-B2; see also *id.* at A2.[4]

The district court also dismissed petitioner's "malicious prosecution" claim that challenged his pretrial detention following the institution of criminal charges. The court understood petitioner to bring that claim solely under the Fourth Amendment. Pet. App. B2. Applying Seventh Circuit precedent, the court held

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[3] Petitioner's complaint challenged his pretrial detention under both the Due Process Clause and the Fourth Amendment. See First Am. Compl. ¶¶ 165-167 (Count V) (J.A. 77-78); *id.* ¶¶ 174, 176 (Count VII) (J.A. 79); see also Pl.'s Modified Resp. in Opp. to Defs.' 12(b)(6) Mot. to Dismiss 2 ("Plaintiff has a non-time-barred Fourth Amendment or Due Process claim."). He disclaimed reliance on due process in subsequent district court proceedings, see Pet. App. B2, and did not pursue a due process claim in his petition for a writ of certiorari, see Pet. i.

[4] For petitioner's Section 1983 claims, the district court adopted Illinois's two-year statute of limitations for personal injuries, which petitioner did not dispute below. See *Wallace*, 549 U.S. at 388-390 (state statute of limitations applies in a Section 1983 federal cause of action).

that such a claim is not cognizable under the Fourth Amendment, and that any due process claim is unavailable where state law provides an adequate remedy (which, the court concluded, Illinois law does). *Ibid.* (citing *Newsome* v. *McCabe*, 256 F.3d 747 (7th Cir. 2001)).

4. The court of appeals affirmed, holding that petitioner's Fourth Amendment claim was properly dismissed. Pet. App. A1-A4. The court found that, under circuit precedent, the Fourth Amendment does not apply to detention after arraignment.[5] *Id.* at A3-A4. Rather, the court explained, "once detention by reason of arrest turns into detention by reason of arraignment * * * the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process." *Id.* at A4 (quoting *Llovet* v. *City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014), cert. denied, 135 S. Ct. 1185 (2015)). Even though ten other courts of appeals had "recognized federal malicious-prosecution claims under the Fourth Amendment," the court found no "compelling reason to overrule" its precedent barring such claims. *Id.* at A3-A4.

In *Newsome* and *Llovet*, the court of appeals had applied the reasoning of *Parratt* v. *Taylor*, 451 U.S.

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[5] The Seventh Circuit uses the term "arraignment" as shorthand for the proceeding at which "the person arrested becomes detained pursuant to legal process," whereby "a judicial officer determines that there is probable cause to hold him for trial unless he makes bail." *Llovet* v. *City of Chicago*, 761 F.3d 759, 760 (7th Cir. 2014), cert. denied, 135 S. Ct. 1185 (2015). "Arraignment" in this case occurred on March 18, 2011, the same day as petitioner's arrest, when petitioner had his first appearance on the criminal complaint. On April 8, 2011, petitioner was arraigned on the indictment. Pet. App. A2.

527, 535-544 (1981), to hold that a federal due process claim for malicious prosecution "is not actionable * * * as long as the state provides an adequate remedy for the wrongful act of its employee." *Llovet*, 761 F.3d at 761; *Newsome*, 256 F.3d at 750-751 (citing *Albright* v. *Oliver*, 510 U.S. 266, 281-286 (1994) (Kennedy, J., joined by Thomas, J., concurring)). Applying this rule, the court concluded that petitioner could not bring his malicious prosecution claim under the Due Process Clause because "Illinois has an adequate remedy." Pet. App. A4.

SUMMARY OF ARGUMENT

This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under [Section] 1983," *Wallace* v. *Kato*, 549 U.S. 384, 390 n.2 (2007), and has noted "an embarrassing diversity of judicial opinion" on the subject, *Albright* v. *Oliver*, 510 U.S. 266, 270 n.4 (1994) (plurality opinion) (citations omitted). The Court should now resolve the uncertainty and hold that the Fourth Amendment establishes the minimum constitutional "standard[] and procedure[]," *Gerstein* v. *Pugh*, 420 U.S. 111 (1975), for pretrial detention pursuant to legal process—a determination by a magistrate or grand jury of probable cause of a criminal violation.

1. Petitioner's claim, as it is narrowly drafted, falls under the Fourth Amendment: it seeks damages only for his pretrial detention predicated on findings of probable cause that were based on respondent officers' alleged fabrication of evidence.

The court of appeals incorrectly concluded that the start of legal process necessarily alters that analysis. The institution of formal criminal charges or the issuance of a judicially-authorized arrest warrant initiates

criminal proceedings. If founded on a valid judicial or grand jury determination of probable cause, that legal process will also satisfy, rather than eliminate, the Fourth Amendment prerequisites for pretrial detention. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). The Fourth Amendment does not govern the decision to pursue criminal charges, but only any resulting detention. Similarly, the Fourth Amendment sets the minimum standard for pretrial detention even if a jurisdiction adopts additional or more rigorous procedures for detention or for the institution or continuation of criminal charges, including indictment by grand jury.

Application of the Fourth Amendment to pretrial detention is consistent with *Wallace*, which used the start of legal process to distinguish the common-law tort of false imprisonment from the common-law tort of malicious prosecution for purposes of determining a claim's accrual date and calculating the statute of limitations. 549 U.S. at 388-390. That analogy to common-law torts had no bearing on the applicable constitutional right, the violation of which is the foundation of any Section 1983 claim.

2. This Court should also provide guidance on the elements of and pleading requirements for a Fourth Amendment claim of unlawful pretrial detention—issues that have proved more vexing for the lower courts than the identification of the applicable constitutional right. Indeed, with the exception of the Seventh Circuit, the courts of appeals have broadly agreed after *Albright* that the Fourth Amendment applies to pretrial detention beyond the start of legal process, yet have struggled with the precise elements of a damages claim to vindicate that right.

This Court should further clarify that liability can be imposed only in limited circumstances. Specifically, a plaintiff must prove that the defendant caused him to be seized pursuant to legal process that was unsupported by probable cause, and that the criminal proceedings terminated in his favor. And, to overcome the presumption of probable cause established by a grand jury's indictment or a magistrate judge's neutral determination, a plaintiff must also prove that the defendant acted with intent to deceive or with reckless disregard as to the absence of probable cause. For example, a plaintiff might overcome the presumption of probable cause by demonstrating, as petitioner alleges here, that officers deliberately fabricated the evidence on which criminal charges and pretrial detention were predicated.

The plaintiff further must plead these elements with sufficient specificity. Defenses of immunity, absolute or qualified, may also shield defendants from liability, and operate with particular force to protect from suit the exercise of prosecutorial discretion, *Imbler* v. *Pachtman*, 424 U.S. 409, 424-430 (1976), and testimony before a grand jury, *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1502-1505 (2012).

ARGUMENT

I. PRETRIAL DETENTION BASED ON FABRICATED EVIDENCE AND ABSENT PROBABLE CAUSE VIOLATES THE FOURTH AMENDMENT

The Fourth Amendment governs petitioner's narrow claim, which alleges that his pretrial detention pursuant to a judicial finding of probable cause was based on deliberately fabricated information.

A. Section 1983 establishes a federal cause of action for "the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws" by any person acting under color of state law. 42 U.S.C. 1983. Section 1983, therefore, "is not itself a source of substantive rights"; rather, the first step in evaluating a Section 1983 claim is to identify the specific constitutional right allegedly infringed. See *Albright* v. *Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion) (citation omitted); see also *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979) ("The first inquiry in any [Section] 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."). As narrowly pleaded, petitioner's claim falls under the Fourth Amendment.

Petitioner remained in jail from March 18, 2011 (the date of petitioner's arrest, the filing of the sworn criminal complaint, and the magistrate judge's initial bail determination), until May 5, 2011 (the day after charges were dismissed). Petitioner challenges his pretrial detention under the Fourth Amendment on the ground that probable cause to detain never existed, because the respondent officers allegedly fabricated the evidence against him.[6] And he seeks damages

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[6] Petitioner neither preserved his due process theory below, see Pet. App. B2, nor presented a due process claim in his petition for a writ of certiorari, see Pet. i. This Court therefore need not decide whether petitioner could have also brought his challenge as a procedural due process claim, see *Soldal* v. *Cook Cnty.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."), or whether the Fourth Amendment provides the exclusive textual source of constitutional protection in these circumstances, cf. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); see also *Albright*, 510 U.S. at 275 (plurality opinion) (declining to decide "whether petitioner's claim would succeed under the Fourth

for the harms caused by that detention. Pet. App. A1-A2. Petitioner's allegations do not involve detention based on other findings, such as dangerousness, flight risk, or actual guilt. Nor does petitioner seek damages for lesser restraints on liberty, such as release on bail or restrictions on travel.[7] See *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.26 (1975); see also Pet. Br. 13 ("[T]he gravamen of the claim is unlawful detention, not the mere filing of baseless charges.").

Finally, petitioner alleges that the respondent officers fabricated the critical evidence against him deliberately. See First Am. Compl. ¶¶ 114-117, 121-122 (J.A. 69-70). This case therefore does not involve a claim that the officers collected evidence negligently or believed mistakenly that probable cause existed.

The Fourth Amendment speaks directly to pretrial detention authorized solely because of a judicial finding of probable cause. A magistrate judge's affirmance of the existence of probable cause constitutes the "standard[] and procedure[]" dictated by the Fourth Amendment for "arrest *and detention*." *Gerstein*, 420 U.S. at 111 (emphasis added). This Court in *Gerstein* therefore held that "a State * * * must provide a fair and reliable determination of probable cause as a condition for any significant *pretrial restraint of liberty*." *Id.* at 125 (emphasis added); *Bell* v.

Amendment," when petitioner did "not present[] that question in his petition for certiorari").

[7] This Court therefore need not resolve whether pretrial restrictions on liberty short of physical detention, even if predicated solely on a finding of probable cause, implicate the Fourth Amendment. Cf. *Albright*, 510 U.S. at 280 (Ginsburg, J., concurring) (arguing that, for purposes of the Fourth Amendment, plaintiff "remained effectively 'seized' for trial so long as the prosecution against him remained pending").

Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'") (brackets in original) (quoting *Gerstein*, 420 U.S. at 114).

Application of the Fourth Amendment under such circumstances also is consistent with the view advanced by the plurality in *Albright*, which observed that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." 510 U.S. at 274. Relying on *Gerstein*, the plurality "noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Ibid.* And although "the accused is not 'entitled to judicial oversight or review of the decision to prosecute,'" the plurality found that the Fourth Amendment has significance where a defendant is "not merely charged," but is also arrested and detained.[8] *Ibid.* (quoting *Gerstein*, 420 U.S. at 118-119). In other words, what is actionable under the Fourth Amendment is not the decision to pursue criminal charges, but only petitioner's detention absent a valid probable cause determination.[9] Except in the Seventh Circuit, there is

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[8] Justice Souter provided a fifth voice in *Albright* in support of the Fourth Amendment's application to an unlawful "arrest or other Fourth Amendment seizure" that follows the "formality of filing an indictment, information, or complaint." 510 U.S. at 290 (Souter, J., concurring).

[9] This Court has never determined that probable cause is a constitutional prerequisite to prosecution, and left that question open in *Albright*. See 510 U.S. at 274 (plurality opinion); *id.* at 282

"broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (collecting cases).

B. Contrary to the decision below, the Fourth Amendment does not "fall[] out of the picture," Pet. App. A4, after the start of legal process. A defendant is held pursuant to legal process "when, for example, he is bound over by a magistrate or arraigned on charges." *Wallace* v. *Kato*, 549 U.S. 384, 389 (2007) (citation omitted); *Lem Woon* v. *Oregon*, 229 U.S. 586, 589 (1913) ("When we speak of charging a person with the commission of a crime, we ordinarily mean the commencement of the proceeding, by the filing of a written complaint or accusation.") (citation omitted); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 587 (2d ed. 2011) (updated 2015) ("[A] criminal proceeding must be formally begun by issuance of criminal process, by an indictment, or at least by an official arrest on a criminal charge. Almost any kind of criminal proceeding will qualify.").

A valid criminal charge—whether instituted by sworn complaint or by return of an indictment supported by probable cause—does not *displace* the Fourth Amendment, but rather *satisfies* it. As *Gerstein* recognized, the same Fourth Amendment standard and procedure that may be used to secure an

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(Kennedy, J., concurring) ("The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, * * * nor require a pretrial hearing to weigh evidence according to a given standard."); *Gerstein*, 420 U.S. at 119 ("[A] judicial hearing is not prerequisite to prosecution.") (citations omitted).

arrest warrant also justifies pretrial detention. 420 U.S. at 120 ("The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. * * * The standard is the same as that for arrest."); see *Baker*, 443 U.S. at 143 ("[T]he probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial.").[10] If officers cause detention by intentionally misleading a magistrate or grand jury into concluding that probable cause exists, that basic Fourth Amendment standard is violated, whether the officers' misconduct occurred while procuring an arrest warrant, a *Gerstein* determination, or an indictment unsupported by probable cause.

The Fourth Amendment's role in setting that threshold standard for pretrial detention is not eliminated because *additional* factors may also bear on whether a defendant will remain detained or be released on conditions pending trial, see, *e.g.*, *United*

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[10] The Court in *Baker*, for example, found no constitutional violation where a suspect was detained for nine days pursuant to a facially valid warrant notwithstanding his claims of innocence and mistaken identity. 443 U.S. at 143-144. The Fourth Amendment was satisfied by the initial probable cause determination and, "[a]bsent an attack on the validity of the warrant under which he was arrested," this Court found no constitutional violation had been alleged for the defendant's continued pretrial detention. *Ibid.* *Baker* observed that pretrial detention normally will be constitutional if a person was detained pursuant to a warrant "conforming * * * to the requirements of the Fourth Amendment," and if he were afforded the right to a speedy trial. *Id.* at 144-146.

States v. *Salerno*, 481 U.S. 739 (1987); 18 U.S.C. 3142, 3144 (requiring detention hearing and enumerating factors governing pretrial detention and release conditions in federal cases), or because a subsequent proceeding—including an adversarial preliminary hearing, see, *e.g.*, Fed. R. Crim. P. 5.1, or indictment by grand jury, see U.S. Const. Amend. V—is required for charges to proceed to trial. Establishing a consistent role for the Fourth Amendment in authorizing pretrial detention is particularly important because "state systems of criminal procedure vary widely" in their processes for determining probable cause.[11] *Gerstein*, 420 U.S. at 123; see, *e.g.*, 1 Nancy Hollander et al., *Wharton's Criminal Procedure* § 7.2 (14th ed. 2015). Jurisdictions are free to go beyond the constitutional minimum, but such additional measures supplement, rather than supplant, the Fourth Amendment right to a neutral determination of probable cause, which is the basic prerequisite for pretrial detention. See *Gerstein*, 420 U.S. at 124-125 ("*What-*

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[11] In the federal system, the initial probable cause determination may be made in one of three ways: (1) a defendant may be charged by an indictment, Fed. R. Crim. P. 6, 7(a) and (c), after which an arrest warrant must issue (unless the government requests a summons), Fed. R. Crim. P 9(a); (2) a defendant may be charged by criminal complaint, resulting in the issuance of an arrest warrant if the complaint is supported by an affidavit establishing probable cause for the offense, Fed. R. Crim. P. 3, 4(a); or (3) a defendant may be arrested without warrant, upon probable cause alone, in which case, a criminal complaint "must be promptly filed." Fed. R. Crim. P. 5(b). Regardless of the procedure justifying the arrest, upon seizure, a defendant must be brought before a magistrate judge for an initial appearance "without unnecessary delay" to be informed, *inter alia*, of the charges against him. Fed. R. Crim. P. 5(a) and (d).

ever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty.") (emphasis added); see also *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55 (1991) ("*Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures.").

A subsequent and independent determination of probable cause nonetheless may have substantial relevance to the pleading and proof of a Fourth Amendment claim for unlawful pretrial detention. For example, a plaintiff must allege a causal link connecting the malfeasance (here, the fabrication of evidence), the institution of process, and his detention. See Pt. II.A, *infra*. If independent and untainted evidence sufficient to establish probable cause of a criminal violation were presented before the grand jury or at a subsequent preliminary hearing, the elements of a Fourth Amendment claim would not be satisfied. Cf. *Hartman* v. *Moore*, 547 U.S. 250, 252 (2006) (The "want of probable cause must be alleged and proven" by a plaintiff bringing a *Bivens* or Section 1983 claim for retaliatory prosecution.). Relatedly, the Fourth Amendment does not govern allegations that a government agent subverted other pretrial procedures not mandated by the Fourth Amendment; nor does it pertain to the falsification of evidence that is not essential to the probable cause determination. See, *e.g.*, *Salerno*, 481 U.S. 739 (evaluating the federal detention statute under the Due Process Clause and the Eighth Amendment); *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978) (no evidentiary hearing required on Fourth Amendment challenge to a search warrant if "material that is the subject of the

alleged falsity or reckless disregard is set to one side" and "there remains sufficient content in the warrant affidavit to support a finding of probable cause"); see also *Gerstein*, 420 U.S. at 119-120 (observing that a preliminary hearing in "some jurisdictions * * * may approach a prima facie case of guilt" and may entail complex and adversarial proceedings beyond the informal, ex parte procedure required by the Fourth Amendment).

The Fourth Amendment may also be implicated by arrest and pretrial detention predicated on an indictment returned by a grand jury that was based on deliberately fabricated evidence. To be sure, the right to indictment by grand jury for federal felony offenses is found in the Fifth Amendment, not the Fourth Amendment.[12] U.S. Const. Amend. V; see *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Nonetheless, an indictment "'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause." *Gerstein*, 420 U.S. at 117 n.19 (citation omitted). As a result, "a grand jury's judgment" may "substitute for that of a neutral and detached magistrate" to justify the de-

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[12] The Grand Jury Clause of the Fifth Amendment provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The Grand Jury Clause, however, has not been incorporated into the Fourteenth Amendment applicable to the States. See *Hurtado* v. *California*, 110 U.S. 516, 537-538 (1884); see also *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("[T]his Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions."). Only a minority of States require indictment by grand jury for all felony offenses. See 2 Sara Sun Beale et al., *Grand Jury Law and Practice* § 8:2 (2d ed. 2015).

fendant's arrest and detention under the Fourth Amendment. *Ibid.*; accord *Kaley* v. *United States*, 134 S. Ct. 1090, 1098 (2014) ("[A]n indictment eliminates [a defendant's] Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention" because "[that body's] judgment substitute[s] for that of a neutral and detached magistrate.") (quoting *Gerstein*, 420 U.S. at 117 n.19). In a federal case, a returned indictment thus serves a dual constitutional purpose: it constitutes a probable cause determination by a neutral factfinder for purposes of the Fourth Amendment, and it fulfills the Fifth Amendment guarantee of indictment by grand jury for felony offenses. See *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972) ("[T]he ancient role of the grand jury * * * has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.").

Absent the sort of intentional malfeasance by a government affiant or witness alleged by petitioner, the threshold Fourth Amendment requirements for pretrial detention normally will be fulfilled at the outset of the legal process by virtue of an arrest warrant, *Gerstein* hearing, or indictment. But where that initial probable cause determination is subverted, pretrial detention may violate the Fourth Amendment.

C. *Wallace* is consistent with this framework. *Wallace* held that the start of legal process demarcates the time when the common-law tort of false imprisonment ends and the separate common-law tort of malicious prosecution begins. See 549 U.S. at 389-390 ("[F]alse imprisonment" is "detention *without*

legal process," while "malicious prosecution" "remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.") (citation omitted). The distinction between these common-law torts was relevant in *Wallace* only because common-law tort principles inform the accrual of the claim and determine whether the statute of limitations has expired.[13] *Id.* at 388. That distinction had no bearing, however, on the applicable constitutional right, and the Court in *Wallace* expressly declined to decide whether "such a claim is cognizable under [Section] 1983." *Id.* at 390 n.2.

Petitioner's claim may, under *Wallace*, be most closely analogous to the common-law tort of "malicious prosecution," but petitioner does not seek damages for his "prosecution" standing alone. Instead, he seeks damages for his pretrial detention pursuant to criminal charges. And although the common-law tort of malicious prosecution may, by analogy, inform the elements and prerequisites of a Section 1983 claim, see Pt. II.A, *infra*, the term "malicious prosecution" nonetheless tends to obscure rather than elucidate the *constitutional* basis for petitioner's claim, and pro-

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[13] For this reason, the district court correctly dismissed as time-barred petitioner's allegations challenging his warrantless arrest, since that claim, akin to common-law "false arrest," accrued when legal process began. See *Wallace*, 549 U.S. at 389-390. Petitioner was charged with a criminal offense the same day as his arrest—March 18, 2011—more than two years before his April 22, 2013, complaint was filed (and thus beyond the applicable statute of limitations under Illinois law). See Pet. App. A2, B1. Petitioner's claim for unlawful pretrial detention after the initiation of criminal process was timely, however, because it did not accrue until the drug charge was dismissed on May 4, 2011. See *Wallace*, 549 U.S at 389-390; see also Pet. App. A2.

vides no insight into whether that claim is properly scrutinized under the Fourth Amendment. See *Castellano* v. *Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003) (en banc) ("The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, * * * they are not claims for malicious prosecution and labeling them as such only invites confusion."), cert. denied, 543 U.S. 808 (2004); see also *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1504-1505 (2012) ("[T]he Court has not suggested that [Section] 1983 is simply a federalized amalgamation of pre-existing common-law claims.").

The fact that distinct claims may arise under Section 1983 as vehicles for the vindication of constitutional rights—*e.g.*, false arrest, false imprisonment, excessive force, or malicious prosecution—does not mean that each of those claims must be supported by a different constitutional amendment; all may fall under the Fourth Amendment if properly pleaded. See *Lambert* v. *Williams*, 223 F.3d 257, 261-262 (4th Cir. 2000) (Even where a claim was "styled * * * as a [Section] 1983 malicious prosecution claim," the court would "not treat [it] as separate and distinct from the appellant's constitutional allegations"; "rather, the foundation for his claim was a seizure that was violative of the Fourth Amendment.") (citation and internal quotation marks omitted), cert. denied, 531 U.S. 1130 (2001); see also *Albright*, 510 U.S. at 277 n.1 (Ginsburg, J., concurring) ("[T]he constitutional tort 42 U.S.C. § 1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law.").

Similarly, not every claim relating to pretrial detention necessarily invokes the Fourth Amendment. Close scrutiny of the nature of the claim, including examination of what process was undermined by the government agent's alleged bad acts, will determine what, if any, constitutional amendment will apply. See *Graham* v. *Connor*, 490 U.S. 386, 393-394 (1989); see also *Baker*, 443 U.S. at 140 ("The first inquiry in any [Section] 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."). A plaintiff may, for example, allege that the use of fabricated evidence at trial violated his constitutional rights, *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("knowing use of perjured testimony violates due process");[14] or he may challenge excessive use of force against him as a pretrial detainee, see *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (Due Process Clause), a ban on hardcover books for pretrial detainees, see *Bell*, 441 U.S. at 548-552 (First Amendment), denial of release on bail pending trial, see *Salerno*, 481 U.S. 739 (due process and Eighth Amendment), or the nature of his punishment after conviction, see *Whitley* v. *Albers*, 475 U.S. 312 (1986) (Eighth Amendment).

Petitioner's claim for damages here targets only his pretrial detention and is predicated on allegations that probable cause never existed to justify that detention because the evidence against him was intentionally fabricated from the outset of legal proceedings. That claim specifically invokes the Fourth Amendment. The court of appeals erred by foreclos-

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[14] A damages action against the prosecutor for using fabricated evidence at trial would be barred by absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

ing that claim as not cognizable under the Fourth Amendment, and its decision should therefore be reversed.

II. THIS COURT SHOULD CLARIFY THAT LIABILITY FOR A FOURTH AMENDMENT CLAIM OF UNLAWFUL PRETRIAL DETENTION UNDER SECTION 1983 CAN BE IMPOSED ONLY IN LIMITED CIRCUMSTANCES

Whether petitioner's claim is cognizable depends not only on the locus of the constitutional right, but also on the elements of a Fourth Amendment claim for unlawful pretrial detention under Section 1983. This Court has addressed individual elements of the common-law malicious prosecution tort. See, *e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994) (favorable termination of prior criminal prosecution required if successful Section 1983 suit would imply invalidity of a prior conviction); *Hartman*, 547 U.S. at 261-266 (absence of probable cause a necessary element of a First Amendment "retaliatory-prosecution" claim). But the Court has thus far declined to resolve "the contours of a Fourth Amendment malicious-prosecution suit under [Section] 1983." *Wallace*, 549 U.S. at 390 n.2; see *Albright*, 510 U.S. at 275 (plurality opinion) ("express[ing] no view as to whether petitioner's claim would succeed under the Fourth Amendment").

Since *Albright*, the courts of appeals have struggled to translate the constitutional right under the Fourth Amendment into the elements of a constitutional tort under Section 1983. See *Hernandez-Cuevas*, 723 F.3d at 99 ("[T]he circuits are divided over the elements of such a claim."); *Castellano*, 352 F.3d at 945 ("We have been inexact in explaining the elements of a claim for malicious prosecution brought

under the congressional grant of the right of suit under 42 U.S.C. § 1983. We are not alone."); *Lambert*, 223 F.3d at 261 (observing that "[i]n the wake of *Albright*, the courts of appeals have diverged" on the existence of a Section 1983 "malicious prosecution" claim and its elements).

The Court should now provide guidance to the courts below and clarify the limited circumstances in which liability is appropriate and the rigorous pleading requirements that apply to such claims.

A. A Section 1983 Fourth Amendment Claim For Unlawful Pretrial Detention Requires Proof That Defendants Caused Plaintiff's Seizure, Pursuant To Legal Process, By Conduct That Intentionally Or Recklessly Disregarded The Lack Of Probable Cause

Section 1983 permits a claim only "for injuries caused by the deprivation of constitutional rights," *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978), and therefore "does not provide a federal cause of action for every violation of state common law," *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1285 (10th Cir. 2004). See *Rehberg*, 132 S. Ct. at 1504-1505. Nonetheless, "[i]n some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right." *Carey*, 435 U.S. at 258. For that reason, common-law tort principles provide the "starting point" for "defining the elements of damages and the prerequisites for their recovery" under federal law, *id.* at 257-258, including accrual and tolling, see *Wallace*, 549 U.S. at 388; *Heck*, 512 U.S. at 489-490, and immunities from suit, see *Wyatt* v. *Cole*, 504 U.S. 158, 163-164 (1992). See generally *Rehberg*, 132 S. Ct. at 1502 ("[T]his Court has long recognized that [Section

1983] was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits."); *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976) ("[Section] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."). In other words, common-law principles guide the inquiry, but do not control it. *Hartman*, 547 U.S. at 258 ("[T]he common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts.").[15]

The courts of appeals largely agree that a plaintiff can establish liability under Section 1983 for a Fourth Amendment claim for unlawful pretrial detention pursuant to legal process only by showing that the defendants (1) caused (2) a seizure of the plaintiff (3) pursuant to legal process initiated against the plaintiff (4) that was unsupported by probable cause, and (5) that resolved in the plaintiff's favor.[16] See *Hernan-*

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[15] Notwithstanding the strong association between the Fourth Amendment and the common-law tort of malicious prosecution, they are not a perfect fit. Most prominently, a common-law claim of malicious prosecution does not have seizure as an element—a necessary component of a Fourth Amendment claim. See William P. Keeton et al., *Prosser and Keeton on the Law of Torts* 874-885 (5th ed. 1984) (elements of prima facie malicious-prosecution claim include (1) the initiation or maintenance of a proceeding against the plaintiff by the defendant; (2) termination of that proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) the defendant's actual malice).

[16] This Court in *Heck* provided good reasons for imposing a favorable termination requirement in a malicious-prosecution action. *Heck* held that a Section 1983 claim for unconstitutional conviction or imprisonment does not accrue until termination of criminal proceedings (or invalidation of a final criminal conviction) if the tort action would impugn the validity of that proceeding, convic-

dez-Cuevas, 723 F.3d at 99 (describing the courts of appeals' views on the elements of the claim); *Sykes* v. *Anderson*, 625 F.3d 294, 309 (6th Cir. 2010) (same).

A plaintiff in petitioner's position must also establish that the defendant officers acted with intent to deceive or with reckless disregard of the absence of probable cause. To be sure, "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances," and "subjective concepts like 'malice'" generally "have no proper place in that inquiry." *Graham*, 490 U.S. at 399. But a bad-faith requirement in this context does not improperly inject subjective intent into the Fourth Amendment analysis; rather, proof of intentional or reckless falsehood is required to overcome the presumption of probable cause afforded to a magistrate judge's neutral determination.[17] See *Malley* v. *Briggs*, 475 U.S. 335, 351

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tion, or sentence. See 512 U.S. at 486. To do otherwise would "permit a collateral attack on [a criminal] conviction through the vehicle of a civil suit." *Id.* at 484 (citation omitted). The favorable termination requirement also "avoids parallel litigation over the issues of probable cause and guilt." *Ibid.* (quoting 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:5, at 24 (1991)). And it prevents "the creation of two conflicting resolutions arising out of the same or identical transaction" by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Ibid.* (citation omitted). These considerations apply with equal force to a Fourth Amendment claim under Section 1983 for unlawful pretrial detention pursuant to legal process: Favorable termination of the underlying criminal proceedings similarly should be required before the claimant is permitted to challenge the probable cause for his detention.

[17] The intent required for a Section 1983 Fourth Amendment claim of unlawful pretrial detention is not directly akin to the common-law element of "malice," which in a malicious prosecution

(1986) (Powell, J., concurring) ("In cases where a criminal defendant has asserted claims of unconstitutional search and seizure, this Court has consistently accorded primary evidentiary weight to a magistrate's determination of probable cause."); *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("A magistrate's determination of probable cause should be paid great deference by reviewing courts.") (citation omitted).

To an even greater degree, an indictment "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." *Gerstein*, 420 U.S. at 117 n.19. This presumption of probable cause is based on "the whole history of the grand jury institution," and is so "inviolable" that an indictment "triggers 'issuance of an arrest warrant without further inquiry" into the case's strength." *Kaley*, 134 S. Ct. at 1097-1098 (quoting *Gerstein*, 420 U.S. at 117 n.19) (citation omitted); see Fed. R. Crim. P. 9(a). During a criminal proceeding, "a challenge to the reliability or competence of the evidence supporting a grand jury's finding of probable cause will not be heard." *Kaley*, 134 S. Ct. at 1097 (citation omitted). In a subsequent civil action, an

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suit broadly encompasses any improper "purpose in instituting the criminal claim other than bringing the offender to justice." *Miller* v. *Sanilac Cnty.*, 606 F.3d 240, 248 (6th Cir. 2010) (citation omitted); see *Heck*, 512 U.S. at 494 (Souter, J., concurring) (defining the "malice" element at common law). By contrast, the intent required to challenge a neutral probable cause determination under the Fourth Amendment pertains only to the defendant's intent to deceive or reckless disregard for the absence of probable cause. See *Franks*, 438 U.S. at 171-172; cf. *Hernandez-Cuevas*, 723 F.3d at 102 (The submission of a warrant with deliberate falsehoods is the "kind of reprehensible behavior [that] seems indistinguishable from the common law element of malice.").

indictment is therefore typically treated as prima facie evidence of probable cause that may be overcome only by a showing that the defendant misrepresented, withheld, or falsified evidence when procuring it.[18] *White* v. *Frank*, 855 F.2d 956, 961-962 (2d Cir. 1988), overruled on other grounds, *Rehberg*, 132 S. Ct. 1497; *Moore* v. *Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009) (collecting cases).

The framework of *Franks* v. *Delaware*, 438 U.S. 154, is instructive. *Franks* held that a criminal defendant moving to suppress evidence seized pursuant to a warrant may obtain an evidentiary hearing only if the supporting affidavit contained deliberate or reckless falsehoods essential to the finding of probable cause.[19] *Id.* at 171-172. *Franks* derived its intent

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[18] Petitioner obtained a copy of the grand jury transcript in this case. See J.A. 94-96. Nonetheless, in future cases, challenges to the grand jury's probable-cause determination may not warrant breaching the secrecy of grand jury proceedings. *Rehberg*, 132 S. Ct. at 1509. To protect that "vital secrecy," this Court not only granted absolute immunity to grand jury witnesses from civil liability, but also precluded the use of grand jury testimony as "the basis for, or * * * as evidence supporting, a [Section] 1983 claim." *Ibid.*

[19] Lower courts broadly agree that the principles of *Franks* should also extend to Section 1983 damages claims based on arrest warrants. See, *e.g.*, *Hawkins* v. *Gage Cnty.*, 759 F.3d 951, 958 (8th Cir. 2014) ("This rule applies equally to an affidavit supporting an arrest warrant.") (citations omitted); see also *Hernandez-Cuevas*, 723 F.3d at 101-102; *Wilson* v. *Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *United States* v. *Colkley*, 899 F.2d 297, 299-303 (4th Cir. 1990); *United States* v. *Martin*, 615 F.2d 318, 327-329 (5th Cir. 1980); *Wolford* v. *Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); *Kelly* v. *Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994); but see *United States* v. *Awadallah*, 349 F.3d 42, 64 n.17 (2d Cir. 2003) ("The *Franks* doctrine arose in the context of a search warrant, and

requirement from "language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise." *Id.* at 164. The Court explained that "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *Ibid.* (quoting *United States* v. *Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966)) (emphasis added). The Court thereby recognized that any challenge to a warrant must acknowledge the limits inherent in a probable cause determination: A "truthful" affidavit does not mean that "every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165; see *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014) ("[S]earches and seizures based on mistakes of fact can be reasonable."). Therefore, a warrant (and, *a fortiori*, an indictment) must withstand challenge to its validity so long as "the information put forth is believed or appropriately accepted by the affiant as true."[20] *Franks*, 438 U.S. at 165.

Proof of reckless or intentional conduct in the institution of a criminal proceeding is therefore necessary

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neither the Supreme Court nor this Court has extended it to arrest warrants.") (citations omitted), cert. denied, 543 U.S. 1056 (2005); cf. *Walczyk* v. *Rio*, 496 F.3d 139, 157-158 (2d Cir. 2007) (conducting *Franks* analysis of an arrest warrant).

[20] Moreover, an allegation of intentional or reckless falsehood essential to probable cause parallels the qualified immunity standard, which "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341, 343.

to overcome the presumption of regularity and good faith that inheres in an indictment returned by a grand jury or a determination of probable cause by a neutral magistrate judge. As a result, to establish liability for a Fourth Amendment claim under Section 1983 for unlawful pretrial detention, a plaintiff must allege "deliberate falsehood" or a "reckless disregard for the truth," that is necessary to the determination of probable cause. *Franks*, 438 U.S. at 171.

B. Any Claim For Unlawful Pretrial Detention Should Be Pleaded With Specificity, And May Be Barred By Immunity Or Precluded By "Special Factors"

To adequately plead a claim, a Section 1983 complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The factors bearing on that inquiry "will vary with the constitutional provision at issue." *Id.* at 676. Because claims of unlawful intent and deliberate fabrication are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998); see also *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004), the pleading standard in cases such as this one should be scrupulously enforced. Any allegations of deliberate falsity or reckless disregard for the truth must be nonconclusory. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citation omitted); accord *Franks*, 438 U.S. at 171 (The complaint "should point out specifically the portion of the warrant affidavit that is claimed to be false; and [it] should be accompanied by a statement of supporting

reasons," including [a]ffidavits or sworn or otherwise reliable statements of witnesses * * * , or their absence satisfactorily explained.").

A claim such as petitioner's will also often fail due to the defendant's immunity, absolute or qualified. For example, any action against the prosecutor herself will be barred by prosecutorial immunity. *Imbler*, 424 U.S. 409. As noted above, respondent police officers may likewise be shielded by qualified immunity. *Malley*, 475 U.S. at 341. In addition, to the extent a plaintiff seeks to establish liability by relying on an officer's grand jury testimony, absolute immunity applies. See *Rehberg*, 132 S. Ct. at 1506. This absolute-immunity rule "may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness's testimony to support any other [Section] 1983 claim concerning the initiation or maintenance of a prosecution." *Ibid.*

Finally, Section 1983 applies solely to state actors; the federal analog is a claim brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Iqbal*, 556 U.S. at 675 ("In the limited settings where *Bivens* does apply, the implied cause of action is the federal analog to suits brought against state officials under 42 U.S.C. § 1983.") (citation and internal quotation marks omitted). However, a *Bivens* remedy is an implied cause of action; "it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Courts will not imply a *Bivens* remedy where "special factors" counsel hesitation, and "in most instances," the Supreme Court has "found a

Bivens remedy unjustified." *Ibid.* (citation omitted). Recognition of a Fourth Amendment seizure claim, on the facts presented here, does not necessarily justify an implied cause of action under *Bivens*, because special factors, including alternative remedies, may counsel hesitation. See *ibid.* ("[A]lternative, existing process for protecting the interest" may "amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.") (citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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In the Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

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INTEREST OF *AMICUS CURIAE*

I am a member of the Illinois Bar and the Julius Kreeger Professor Emeritus at the University of Chicago Law School. My principal fields of study are criminal law and criminal procedure, subjects I have taught for fifty years. My interest in this case is simply that of a friend of this Court.[1]

SUMMARY OF ARGUMENT

This brief argues that the seizure of Elijah Manuel began when he was unlawfully arrested and ended when he was released forty-eight days later. The Seventh Circuit's contrary view—that the Fourth Amendment "falls out of the picture" when legal process issues—is inconsistent with the amendment's text, the Framers' understanding of this amendment, and many of this Court's decisions. The principal object of the Fourth Amendment was to outlaw abuses of legal process and to prevent the sorts of oppressive searches and seizures that judges previously had authorized. The Seventh Circuit's view is also inconsistent with *Gerstein v. Pugh*, 420 U.S. 103 (1975), which holds that the Fourth Amendment protects against unwarranted detention throughout the pretrial

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[1] Pursuant to Rule 37.6, I declare that no counsel for a party has authored this brief in whole or in part and that no one other than my co-counsel and I has made any monetary contribution to the preparation and submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

period. Finally, the court's view is inconsistent with this Court's § 1983 jurisprudence. *Malley v. Briggs*, 475 U.S. 335 (1985), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), resolve the question presented by this case, for they permit recovery for post-process deprivations of liberty in violation of the Fourth Amendment. This brief asks the Court to approve the view of nine courts of appeals that wrongful detention following the issuance of legal process can violate the Fourth Amendment and give rise to a cause of action under 42 U.S.C. § 1983.

PART I

BACKGROUND

To clarify the stakes in Manuel's case and the legal context in which it arises, this introductory Part reviews some procedural steps in a criminal case, notes some requisites of a collateral challenge to a judicial determination of probable cause, describes the common law torts of false imprisonment and malicious prosecution, and sets forth the competing positions of the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits on the one hand and the Seventh and Fifth Circuits on the other. This Part begins by recounting some recent history and describing a hypothetical case.

A. RECENT EXONERATIONS AND A HYPOTHETICAL CASE

According to the National Registry of Exonerations, 1781 people convicted of crimes have been exonerated by pardon, dismissal, or acquittal since 1989. Official misconduct contributed to the

convictions of 923 (52%) of these people. The National Registry of Exonerations, *Percentage of Exonerations by Contributing Factor*, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited May 8, 2016).

In an astonishing number of cases, police officers deliberately fabricated evidence to implicate the innocent. See, *e.g.*, Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (describing the Rampart police scandal in which numerous Los Angeles police officers framed people by planting evidence and committing perjury); Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash. U. L. Rev. 1133, 1139–41 (2013) (describing how the State of Texas agreed to vacate nearly fifty convictions obtained after undercover agent Tom Coleman falsely claimed to have bought cocaine from more than 20 percent of the adult black residents of Tulia, Texas); Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed After Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (reporting the dismissal of 39 cases in Dallas when material that police laboratory testing allegedly had shown to be cocaine was shown in fact to be ground-up wallboard material).

Actions under 42 U.S.C. § 1983 alleging arrest and detention in violation of the Fourth Amendment may arise from circumstances like those of the following hypothetical case:

On Day 1, Officer Rogue planted false evidence and arrested Innocent Plaintiff. On Day 2, the planted evidence persuaded a magistrate to find probable cause for Plaintiff's arrest and to hold him for trial. On Day 100, the false evidence convinced a jury to convict Plaintiff, and a judge sentenced him to ten years in prison. On Day 2500, the Governor pardoned Innocent Plaintiff, declaring that both his innocence and Officer Rogue's misconduct had been shown by overwhelming evidence.

B. THREE PERIODS OF DETENTION FOLLOWING A WARRANTLESS ARREST: WHY A RULING AGAINST THE PLAINTIFF IN THIS CASE MIGHT LEAVE MANY VICTIMS OF FALSIFIED EVIDENCE WITH NO FEDERAL REMEDY

The case before this Court differs from Innocent Plaintiff's in one respect. Elijah Manuel's innocence became clear and his detention ended prior to trial. The prosecutor dismissed his case and he was released after he had been held for forty-eight days, dropped college courses he was unable to attend, missed work, and saw his credit rating lowered because he was unable to make payments on student loans and other obligations. Manuel's case, unlike Innocent Plaintiff's, does not pose the question whether an unconstitutionally seized person may recover damages for imprisonment following conviction.

Nevertheless, it may aid the Court's analysis to take a broader view of the criminal process than

the present case requires. This section therefore considers three periods of detention that may follow an arrest without a warrant—(1) from arrest to a judicial determination of probable cause, (2) from a judicial determination of probable cause to conviction by trial or guilty plea, and (3) from conviction by trial or guilty plea to exoneration and release.

As a result of decisions by this Court, the initial period of detention is likely to be brief. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), holds that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." It also holds that this "determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), holds that the judicial determination of probable cause ordinarily must be made within 48 hours of an arrest made without a warrant.

Section 1983 entitles someone in Innocent Plaintiff's position to recover damages for the unlawful detention that occurred in the first period (the period before the judicial determination of probable cause). See *Wallace v. Kato*, 549 U.S. 384, 389–90 (2007). As a practical matter, however, someone framed by the police often may be unable to obtain this recovery. Until Innocent Plaintiff was exonerated, no rational lawyer would have taken his seemingly hopeless case. By the time he was

exonerated, if the statute of limitations had begun to run at arraignment, the period for filing suit probably would have passed.[2]

Wallace holds that the statute of limitations does begin to run at arraignment when a plaintiff has presented only a "Fourth Amendment false-arrest claim." 549 U.S. at 387 n.1 ("We expressly limited our grant of certiorari to the Fourth Amendment false-arrest claim."); *id.* at 389–90 (holding that the false arrest claim accrued at the time of arraignment). The decision also holds that, although this plaintiff may not file suit while imprisoned following his conviction, the statute of limitations is not tolled during this period. *Id.* at 394–97. The Court, however, recognized that a Fourth Amendment violation might extend beyond arraignment into the second and third periods of detention. See *id.* at 390 n.2 ("We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here.").

The second period of detention—between a determination of probable cause and a trial verdict or other disposition—can be short (or even

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[2] This Court has held that the applicable statute of limitations is the one governing personal injury actions in the state courts. *Wilson v. Garcia*, 471 U.S. 261, 276–79 (1985). In most states, this statute sets the limitations period at two or three years. See Nolo, *Chart: Statutes of Limitations in All 50 States*, http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html (last visited May 8, 2016).

nonexistent if the accused is released unconditionally pending trial). But this period can also be long. In 2013, 539 inmates of the Cook County Jail had been held for more than two years while awaiting trial, and forty had been held for more than five years. See Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays*, Chicago Daily Law Bulletin, Dec. 11, 2015, http://www.chicagolawbulletin.com/Archives/2015/12/11/burke-keynote-12-11-15.aspx.

The third period—from conviction to exoneration and release—is likely to be long. The average time served by America's wrongly convicted, later exonerated prisoners was nine years. The National Registry of Exonerations, *Basic Patterns*, http://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx (last visited May 8, 2016). A person framed by a police officer, however, can sometimes obtain damages for imprisonment during this final period without securing a determination that the officer violated the Fourth Amendment.

The officer may be liable for wrongful detention during this last period because he participated in the state's failure to reveal exculpatory evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995). In some circumstances, he may also be liable for the knowing use of perjured testimony, for this use is also a due process violation. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935). In addition, the malicious initiation of a baseless prosecution may constitute a due process violation when an adequate state

remedy for common law tort of malicious prosecution is unavailable. See *Albright v. Oliver*, 510 U.S. 266, 281–86 (1994) (Kennedy, J., concurring in the judgment); *Newsome v. McCabe*, 256 F.3d 747, 750–51 (7th Cir. 2001).

The due process rights just described are limited, however, in ways that may block a § 1983 plaintiff framed by a police officer from obtaining a federal remedy for wrongful detention in the second and third periods:

1) Although the Due Process Clause may entitle a plaintiff to recover for malicious prosecution when no adequate state remedy is available, only one reported decision appears ever to have held a state remedy inadequate. See *Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (holding remedies inadequate when a state afforded police officers absolutely immunity from suit).

2) An officer who himself gives perjured testimony at trial or before a grand jury is immune from suit for his perjury. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1500 (2012).

3) *Brady*'s disclosure requirements are unlikely to provide a basis for recovery when, as in this case, charges are dismissed prior to trial. See LaFave et al., *Criminal Procedure* § 24.3, at 1147 (5th ed. 2009) ("[T]he *Brady* rule does not impose a general requirement that the government disclose prior to trial exculpatory evidence

that is material to the issue of guilt. Due process requires only that disclosure of exculpatory evidence be made in sufficient time to permit defendant to make effective use of that evidence at trial."); *Rogala v. District of Columbia*, 161 F.3d 44, 55–56 (D.C. Cir. 1998) (publishing and endorsing the district court's opinion) (declaring that a pretrial dismissal "ends the analysis" because plaintiffs cannot show that an officer's failure to preserve evidence was prejudicial).

4) *Brady* also may provide no basis for recovery when a wrongly accused plaintiff has been acquitted at trial. See *Bianchi v. McQueen*, No. 14–1635, ___ F.3d ___, 2016 WL 1213270, at *8 (7th Cir. Mar. 29, 2016) ("A violation of *Brady* requires a showing of prejudice, which can't be made here because the plaintiffs were acquitted.").

5) *Brady* may not supply a basis for recovery even after conviction when a wrongly accused person has pleaded guilty. See Covey, *Plea Bargaining Law After* Lafler *and* Frye, 51 Duq. L. Rev. 595, 601 (2013) ("It is . . . unclear whether a prosecutor has a constitutional duty to produce exculpatory evidence . . . before a guilty plea is entered."); cf. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that the due process clause does not require "preguilty plea disclosure of impeachment information" while leaving open the

question whether the clause may require the disclosure of other *Brady* material).

In all of these circumstances, the ability to establish a Fourth Amendment violation may be crucial. Holding that a Fourth Amendment violation ends when a wrongly arrested plaintiff is arraigned may leave a plaintiff without a federal remedy for post-process detention even when he has been framed by a police officer.[3]

C. TWO COMMON LAW TORTS

At both the time the Fourth Amendment was ratified and the time § 1983 was enacted, the common law would have allowed Innocent Plaintiff to recover damages from Officer Rogue for the entire period from his arrest to his release. At the time the Fourth Amendment was ratified, however, pleading requirements would have required Plaintiff to bring two separate lawsuits to obtain

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[3] Even when recovery for detention in the second and third periods is permitted, obtaining this recovery is difficult. Following a judicial determination of probable cause, a § 1983 plaintiff can offer only two sorts of challenges. First, he can allege that evidence presented to the judicial officer was both false and essential to the determination of probable cause. To prevail, the plaintiff must show that the police officer deliberately falsified the critical evidence or presented it with reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Second, the plaintiff can claim that, although the police officer was truthful, the evidence he presented did not establish probable cause. A plaintiff who makes a claim of this sort can prevail only if "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S. at 341.

this recovery—one alleging false imprisonment and the other alleging malicious prosecution. By 1871, when § 1983 was enacted, many states had relaxed these pleading requirements, allowing joinder of the two claims.

As this Court explained in *Wallace*:

> The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process* . . . . Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by an absence of legal process, but by *wrongful institution* of legal process.

549 U.S. at 389–90; see also *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("[U]nlike the related cause of action for false arrest or imprisonment, [the cause of action for malicious prosecution] permits damages for confinement imposed pursuant to legal process.").

The torts described by the Court are centuries old and grew out of different royal writs. The appropriate form of action for false imprisonment was trespass *vi et armis*, see 3 W. Blackstone, *Commentaries* *138, and that for malicious prosecution was trespass on the case. See *id.* at *126–27. Establishing liability for malicious prosecution required proof of two elements not included in the action for false imprisonment—malice and a termination of the proceedings in favor of the accused. See D. Dobbs, *The Law of Torts* §§ 433 and 434 (2000); *Stewart v. Sonneborn*,

98 U.S. 187, 192 (1878) (declaring that the plaintiff must show that the defendant was "actuated in his conduct by malice, or some improper or sinister motive"); *id.* at 195 ("In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed."). Both torts required a showing that the defendant acted without probable cause. See Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Texas L. Rev. 157, 176 (1937).[4]

A plaintiff who claimed that his arrest was unlawful was required to choose between the two causes of action. If the arrest had occurred without a warrant, he could challenge its legality only in a suit for false imprisonment. If the arrest had occurred pursuant to a warrant, he could challenge it only in a suit for malicious prosecution. The issuance of an arrest warrant or other legal process marked a sharp divide between the two actions. See, *e.g.*, *Morgan v. Hughes*, 100 Eng. Rep. 123, 125–26 (K.B. 1788) ("[A] justice of the peace, who grants a warrant against a person accused, cannot

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[4] False imprisonment required proof of one element not included in the action for malicious prosecution—imprisonment. The wrongful institution of legal process was actionable at common law even if the defendant had not been seized or arrested. From an early date, however, actions for malicious prosecution permitted the recovery of damages for arrest and imprisonment that followed a false charge as well as for the injury to reputation worked by the charge itself. See Harper, *supra*, at 160 n.8 (collecting sources).

be punished in an action of trespass, though the accusation be false: but if, without any accusation, and knowing the person not to be guilty, he grant his warrant, on which the party is arrested, he is liable to an action on the case by the person unjustly accused."); *Stonehouse v. Elliot*, 101 Eng. Rep. 571, 571–72 (K.B. 1795) (holding that, because a person falsely accused of theft had been brought before a constable who could not initiate legal proceedings, his suit should be for false imprisonment rather than malicious prosecution); *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852) (Taney, C.J.) (noting that an action against a naval officer who ordered a marine private put in irons for failing to perform his duty had "no analogy to a suit for a malicious prosecution" because no legal process had issued); *Colter v. Lower*, 35 Ind. 285, 286–87 (1871); *Southern R. Co. v. Shirley*, 90 S.W. 597, 599 (Ky. 1906); *Roberts v. Thomas*, 135 Ky. 63, 64 (1909); *Broughton v. State*, 335 N.E.2d 310, 314–15 (N.Y. 1975).

An Illinois court noted in 1896, "[A]t common law a claim to recover damages for false imprisonment, in which the form of action was trespass, could not be joined with a claim to recover for malicious prosecution, in which the form of action was trespass on the case." *Mexican C.R. Co. v. Gehr*, 66 Ill. App. 173, 179 (1896). Starting in 1848 and rapidly thereafter, however, code pleading replaced common law pleading in many states. See C. Hepburn, *The Historical Development of Code Pleading in America and England* 92–115 (1897). By the time Congress enacted § 1983, a substantial number of states permitted plaintiffs to

file false imprisonment and malicious prosecution claims together. See, *e.g.*, *Doyle v. Russell*, 30 Barb. 300 (N.Y. S. Ct. 1859) (counts for false imprisonment and malicious prosecution joined); *Bauer v. Clay*, 8 Kan. 580, 584 (1871) ("Under our Code where a party has a cause of action containing all the elements of both malicious prosecution and false imprisonment, as understood at common law, he . may prosecute for his whole cause of action."); *Krug v. Ward*, 77 Ill. 603, 605 (1875) (upholding the joinder of malicious prosecution and false imprisonment claims); *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 764 (1880) (characterizing as "absurd" the "refinements of the common law pleaders in their subtle distinctions between trespass *vi et armis* and case"); *Marks v. Townsend*, 97 N.Y. 590, 594 (1885) (declaring that actions for malicious prosecution and false imprisonment may be joined in the same complaint "and it has been common practice to unite them").

D. TWO VIEWS OF THIS CASE

1. *The Majority View: An Invalid Judicial Determination of Probable Cause Does Not Bring an Unlawful Seizure to an End*

In *Wallace*, this Court noted, "We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . and we do not do so here." 549 U.S. at 390 n.2. This language invited lower courts to consider whether someone detained pursuant to legal process may bring a "Fourth Amendment malicious-prosecution suit under § 1983." Nine courts of appeals have now

allowed suits to recover damages for wrongful detention following the issuance of legal process.[5]

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[5] **D.C. Circuit**: *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007) ("We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment."). **First Circuit**: *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99–100 (1st Cir. 2013) ("[W]e join our sister circuits in concluding that the Fourth Amendment protection against seizure but upon probable cause does not end when an arrestee becomes held pursuant to legal process."). **Second Circuit**: *Swartz v. Insogna*, 704 F.3d 105, 111–12 (2d Cir. 2012) ("The elements of a malicious prosecution claim under section 1983 are derived from applicable state law. Additionally, to be actionable under section 1983 there must be a post-arraignment seizure, the claim being grounded ultimately on the Fourth Amendment's prohibition of unreasonable seizures."). **Third Circuit**: *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("[T]he constitutional violation is the deprivation of liberty accompanying the prosecution."). **Fourth Circuit**: *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("A 'malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort.'") (quoting *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000)). **Sixth Circuit**: *Webb v. United States*, 789 F.3d 647, 659 (6th Cir. 2015) ("Freedom from malicious prosecution is a clearly established Fourth Amendment right."). **Ninth Circuit**: *Lacey v. Maricopa County*, 693 F.3d 896, 919 (9th Cir. 2012) ("To claim malicious prosecution [under § 1983], a petitioner must allege 'that the defendants prosecuted her with malice and without probable cause, and that they did so for the purpose of denying her of equal protection or another specific constitutional right.'") (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189

In addressing the question posed by *Wallace*, some courts have noted that the term "Fourth Amendment malicious-prosecution suit" can be confusing. See, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 953–54 (5th Cir. 2003) (declaring that Fourth Amendment claims "are not claims for malicious prosecution and labeling them as such only invites confusion"); *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("[T]here is nothing but confusion gained by calling [a] legal theory [brought under the Fourth or any other amendment] 'malicious prosecution.'"). The confusion arises from the fact that the common-law tort and the constitutional provision address different injuries. Malicious prosecution can occur even when a wrongly prosecuted person has not been seized, and a seizure in violation of the Fourth Amendment can occur even when a wrongly seized person has not been prosecuted. See *Gerstein*, 420 U.S. at 118–19 (1975) ("In holding that the prosecutor's assessment of probable cause is not

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(9th Cir. 1995)). **Tenth Circuit**: *Sanchez v. Hartley*, 810 F.3d 750, 755 (10th Cir. 2016) ("[W]e have repeatedly recognized a cause of action under § 1983 for malicious prosecution under the Fourth Amendment."). **Eleventh Circuit**: *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) ("To establish a § 1983 malicious prosecution claim, the plaintiff must prove two things: (1) the elements of the common law tort of malicious prosecution; *and* (2) a violation of his Fourth Amendment right to be free from unreasonable seizures."). The **Eighth Circuit** has not resolved the question. See *Harrington v. City of Council Bluffs*, 678 F.3d 676, 679–80 (8th Cir. 2012).

sufficient alone to justify *restraint of liberty pending trial*, we do not imply that the accused is entitled to judicial oversight or review of *the decision to prosecute*.") (emphasis added); *Albright*, 510 U.S. at 281–82 (Kennedy, J., concurring in the judgment) (noting that the plaintiff's complaint concerned, not the seizure of his person, "but instead the malicious initiation of a baseless criminal prosecution against him" and that "[t]he specific provisions of the Bill of rights [do not] impose a standard for the initiation of a prosecution").

Despite the confusion it may engender, the term "Fourth Amendment malicious-prosecution suit" can be useful. The common law tort, although concerned with the commencement of legal proceedings, allowed recovery for the detention that might follow this event. It thus remedied some but not all of the detention that might now violate the Fourth Amendment. For example, Elijah Manuel might have been able to show prior to the dismissal of the criminal charge against him that he was detained without probable cause. Until the charge was dismissed, however, he could not have established an element of common-law malicious prosecution, a termination of the criminal proceedings in his favor.[6] The authors of § 1983

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[6] A plaintiff who could prove what is now a Fourth Amendment violation also might be unable to establish malice. See, *e.g.*, *Farmer v. Darling*, 98 Eng. Rep. 27, 28 (K.B. 1766) ("[M]alice and the want of probable cause must both

might not have meant to authorize Manuel's recovery before he could prove the elements of the common-law tort. They might have assumed that recovery under § 1983 would be limited in the same way that common-law recovery had been limited. If that were so, it would make sense to refer to a "Fourth Amendment malicious-prosecution suit" and to distinguish it from a "Fourth Amendment false-arrest suit." In this case, Manuel seeks damages for post-process detention in violation of the Fourth Amendment that the common law would have made actionable prior to the enactment of § 1983. He thus brings a Fourth Amendment malicious prosecution suit.

The courts of appeals that would allow Manuel's recovery are divided about whether a plaintiff must establish the elements of the common-law tort. As the First Circuit explained,

> The Fourth, Fifth, Sixth, and Tenth Circuits have adopted a purely constitutional approach, requiring the plaintiff to demonstrate only a Fourth Amendment violation. The Second, Third, Ninth, and Eleventh Circuits, on the other hand, have adopted a blended constitutional/common law approach, requiring the plaintiff to demonstrate a Fourth Amendment violation and all the

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concur."); Dobbs, *supra*, § 433 (noting differences between malice and the absence of probable cause).

> elements of a common law malicious prosecution claim.

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013).[7]

Just as the courts that recognize a Fourth Amendment malicious prosecution suit under § 1983 differ about what elements a plaintiff must establish, they conceptualize the underlying Fourth Amendment violation somewhat differently. The Sixth Circuit has said, "[T]he gravamen of the complaint is continued detention without probable cause." *Gregory v. City of Louisville*, 444 F.3d 725, 748 (6th Cir. 2006).

This position echoes that of four Justices of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, as in this case, the criminal case against the plaintiff was dismissed prior to trial. Although the plaintiff did not "claim a violation of his Fourth Amendment rights," *id.* at 271, Justice Ginsburg suggested in a concurring opinion that a Fourth Amendment claim would have been viable. She wrote that the seizure of a person continues until this person is "freed from the state's control." *Id.* at

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[7] Most courts of appeals seem not to have noticed, but this Court has largely resolved the apparent conflict described in *Hernandez-Cuevas*. *Malley v. Briggs*, 475 U.S. 335 (1985), considers whether a plaintiff alleging post-process detention in violation of the Fourth Amendment must establish common-law malice. It holds that, although he need not, he must establish a close substitute. *Id.* at 341. *Heck*, 512 U.S. at 486–90, holds that this plaintiff must establish a termination of the criminal proceedings in his favor.

278 (Ginsburg, J., concurring). Justice Souter similarly concluded that the protections of the Fourth Amendment continued beyond the issuance of legal process. *Id.* at 289–90 (Souter, J., concurring). Justice Stevens, joined by Justice Blackmun, also declared that "the initial seizure of petitioner continued until his discharge." *Id.* at 307 (Stevens, J., dissenting). Because the plaintiff had presented no Fourth Amendment claim, the other members of the Court did not address the question.

Most courts that have recognized a Fourth Amendment malicious prosecution claim under the Fourth Amendment have envisioned the constitutional violation somewhat differently. They view holding a person for trial and imposing pretrial restraints on his liberty as a seizure distinct from the initial arrest. See *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("[T]he constitutional violation is the deprivation of liberty accompanying the prosecution."); *Britton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) ("For a state actor to violate the Fourth Amendment by initiating malicious prosecution against someone, the criminal charges at issue must have imposed some deprivation of liberty . . . .").

This Court's decisions recognize that extending or augmenting an existing restraint on liberty can constitute a seizure. For example, this Court treats an arrest following a *Terry* stop as a distinct seizure although the arrestee's liberty already has been restrained. See, *e.g.*, *United States v. Sharpe*, 470 U.S. 675, 682–88 (1985); see also *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015)

(treating the unreasonable extension of a traffic stop as a Fourth Amendment violation).

2. *The Minority View: The Fourth Amendment Vanishes When Invalid Legal Process Issues*

When the Seventh Circuit upheld the dismissal of Manuel's § 1983 action, it relied on its recent decision in *Llovet v. City of Chicago*, 761 F.3d 759 (7th Cir. 2014). In *Llovet*, the court found an "implication" in decisions of this Court

> that once detention by reason of arrest turns into detention by reason of arraignment—once police action gives way to legal process—the Fourth Amendment falls out of the picture and the detainee's claim that detention is improper becomes a claim of malicious prosecution violative of due process. If this is right, the doctrine of "continuing seizure" is wrong, as we held, for example, in *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004), which states that our court has "repeatedly rejected the 'continuing seizure approach," instead holding "that the scope of a Fourth Amendment claim is limited up to the point of arraignment." To the same effect is *Hernandez v. Sheahan*, [455 F.3d 772, 777 (7th Cir. 2006)]: "the fourth amendment drops out of the picture following a person's initial appearance in court."

Id. at 763.[8]

One court of appeals other than the Seventh Circuit has endorsed the "vanishing Fourth Amendment" position. The Fifth Circuit, however, left uncertain when the amendment evaporates. In *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003), it held that "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution." The court reserved the question whether the Fourth Amendment might still cast its protection over the period following a judicial officer's determination of probable cause but before the beginning of a trial.

PART II

ARGUMENT

A. THE SEVENTH CIRCUIT'S "VANISHING FOURTH AMENDMENT" VIEW IS INCONSISTENT WITH THE TEXT AND HISTORY OF THE FOURTH AMENDMENT

Although the Seventh Circuit has held repeatedly that the Fourth Amendment "falls out of

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[8] Although *Llovet* spoke of "a claim of malicious prosecution violative of due process," the Seventh Circuit has held that an adequate state remedy for malicious prosecution satisfies all due process requirements and thereby "*knocks out* any constitutional tort of malicious prosecution." *Newsome*, 256 F.3d at 751; cf. *Albright*, 510 U.S. at 281–86 (Kennedy, J., concurring in the judgment).

the picture" when legal process issues, it has offered little explanation of this position. The court's earliest articulation of its view appears to be a statement in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), in which the plaintiff sought damages for an interrogation at gunpoint that occurred after his arrest but before his arraignment. According to the court, the difficulty with the plaintiff's Fourth Amendment claim was that he

> had already been seized. He was seized when he was arrested. A natural although not inevitable interpretation of the word "seizure" would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure. Now once an arrested person is charged but before he is convicted, the question whether the fact, manner, or duration of his continued confinement is unconstitutional passes over from the Fourth Amendment to the due process clause. See *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (Friendly, J.).

Id. at 192–93.

The court supported its assertion that the Fourth Amendment vanishes when an arrestee is arraigned by citing *Johnson v. Glick*, but this opinion did not support its statement in any way. Judge Friendly wrote in a case that did not present any Fourth Amendment issue at all, and his opinion mentioned the Fourth Amendment only to say, "[B]oth before and after sentence,

constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or . . . of the Fourth." *Johnson*, 481 F.2d at 1032.

Before concluding that the Fourth Amendment vanishes, the Seventh Circuit pointed to the amendment's text. As it observed, one could plausibly read the word "seizure" to refer only to the initial apprehension of a suspect—something that happens in a moment—and not to include any detention following this person's arrest. Even acknowledging that the seizure of a person continues until he is arraigned, however, rejects this interpretation and endorses a concept of a (briefly) continuing seizure. Like the Seventh Circuit, this Court has held that a Fourth Amendment seizure continues at least until legal process issues. See *Wallace*, 549 U.S. at 389–90.

The issue in this case is not whether a seizure continues but how long, and the Seventh Circuit offered little reason for vaporizing the Fourth Amendment at the moment it chose—the moment of arraignment. The most natural answer to the question how long a seizure lasts is "until it ends," and courts sometimes have spoken of the duration of a seizure in the same way as the rest of us. See, *e.g.*, *Wood v. United States*, 41 U.S. 342, 359 (1842) (Story, J.) ("If a seizure [of property] has been actually made, and is a continuing seizure; it is no bar to proceedings thereon, that the cause of forfeiture relied on is not the same upon which the seizure was originally made."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) ("[T]he District Court . . . issued a preliminary

injunction restraining the Secretary from 'continuing the seizure . . . .'"); *Dockham v. New Orleans*, 26 La. Ann. 302, 303 (La. 1874) (noting that a seizure of property did not lapse after seventy days as one party contended but continued in accordance with the law); *Stilphen v. Ulmer*, 33 A. 980, 985 (Me. 1895) ("His arrest continued for the space of 12 hours.").

The Seventh Circuit most recently explained its distinctive position in *Llovet v. City of Chicago*, 761 F.3d 759 (7th Cir. 2014). Pointing once more to the amendment's text, it wrote, "There is a difference between seizing a person and not letting him go. . . . When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." *Id.* at 764.

Of course every moment following a person's wrongful arrest can be characterized as one in which he is "not let go when he should be." As noted above, an arrest at the conclusion of a *Terry* stop is not seen as a "failure to let go" governed by the Due Process Clause. It is instead a seizure governed by the Fourth Amendment. The Seventh Circuit offered no reason for focusing only on the moment a *judicial* officer should have let the wrongly arrested person go.[9]

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[9] Even if the constitutional term "seizure" referred only to the initial moment of apprehension, the injury resulting from a seizure would include later detention. This Court has said that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural

Llovet hinted at a historical rather than a textual argument for its view of the Fourth Amendment when it wrote, "The tort of false arrest is the common law counterpart to an unreasonable seizure, forbidden by the Fourth Amendment." 761 F.3d at 763.[10] Perhaps the Seventh Circuit imagined that the Framers of the Fourth Amendment intended to provide a remedy only for wrongs that constituted false imprisonment at common law and not for wrongs that constituted malicious prosecution. That assumption, however, would have been erroneous. Our forebears did not mean the Fourth Amendment to vanish when legal process issued.

An arrest warrant constitutes legal process. See *Cook v. Hart*, 146 U.S. 183, 191 (1892) (discussing an arrest "without warrant or other legal process"); *Wallace*, 549 U.S. at 389 ("[T]he allegations before us arise from respondents' detention of petitioner

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consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). In both Innocent Plaintiff's case and Elijah Manuel's, detention following a judicial determination of probable cause was not only foreseeable at the time the plaintiff was apprehended, it was foreseen and intended. A determination of probable cause might break the causal chain, but only when this determination rested on evidence other than that fabricated by the arresting officer. In the absence of such a break, the initial seizure would remain the cause of the detention.

[10] Ironically, the tort of false imprisonment can be committed by a failure to let go, as when a jailer fails to release an inmate whose term is up. See Dobbs, *supra*, at § 38.

without legal process in January 1994. They did not have a warrant for his arrest."); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995) (in a malicious prosecution suit, "'legal process' will be either in the form of a warrant . . . or a subsequent arraignment"); *Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003) ("A warrant is legal process, and so a complaint about conduct pursuant to it is a challenge to legal process and thus resembles malicious prosecution."); *Young v. Davis*, 554 F.3d 1254, 1257 (10th Cir. 2009) ("An arrest warrant and the probable cause determination by a judicial officer after a warrantless arrest are essentially the same legal process, except that one occurs prior to arrest and the other occurs after."); see also Part I–C *supra* (noting that, at the Framing, a plaintiff challenging an arrest pursuant to a warrant was required to establish the elements of malicious prosecution).

The principal object of the Fourth Amendment was to outlaw abuses of legal process and to prevent oppressive searches and seizures of the sort judges had previously authorized. The Framers spoke to judges, not police officers, when they wrote, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const., Amdt. 4. Declaring that the Fourth Amendment vanishes when legal process issues would lead to the astonishing conclusion that an arrest following

the issuance of an arrest warrant cannot violate the Fourth Amendment. The Framers would have shuddered at the idea.[11]

The Fourth Amendment's warrants clause enshrined in the Constitution three landmark English decisions of the 1760s that held general warrants unlawful. See *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Entick v. Carrington*, 19 Howell's St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 97 Eng. Rep. 1075 (K.B. 1765). In a recent, authoritative study titled *The Original Fourth Amendment*, Professor Donohue notes that a "systematic assault on general warrants" began in England more than 100 years before these decisions. The chief architect of this assault was Sir Edward Coke, previously the Chief Justice of the Court of King's Bench. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. (forthcoming 2016), *available at* http://scholarship.law.georgetown.edu/facpub/1616/.

Coke himself had been seized pursuant to a general warrant in 1621. In 1628, he complained to Parliament not only about his arrest and the unlawful search of his papers but also about the post-arrest detention the invalid warrant produced. "I was committed to the Tower and all my books and study searched . . I was inquired after what I had done all my life before." Donohue, *supra*, at 21

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[11] This Court has never doubted that an arrest pursuant to a warrant can violate the amendment. See, *e.g.*, *Whiteley v. Warden*, 401 U.S. 560, 564–65 (1971).

(quoting Coke to Parliament, Committee of the Whole House, Proceedings and Debates, ff. 100–100v, in CD, III, 149–51 (Apr. 29, 1628), in 3 E. Coke, *Selected Writings of Sir Edward Coke* 58 (Steve Sheppard, ed. 2003)). Coke also declared, "If we agree to this imprisonment 'for matters of state' and 'a convenient time,' we shall leave Magna Carta and the other statutes and make them fruitless, and do what our ancestors would never do." *Id.* at 21–22 (quoting Coke to Parliament, Committee of the Whole House, Proceedings and Debates, f. 99, in CD, III, 94–96 (Apr. 26, 1628), in Coke, *supra*, at 55–56)).

The Framers would have seen Coke's post-legal process detention as inconsistent with the Fourth Amendment, and neither the Seventh Circuit nor anyone else has offered a reason to believe they meant to treat legal process following a warrantless arrest (as in Manuel's case) differently from legal process preceding an arrest (as in Coke's case). It is difficult to conceive of a reason why anyone would endorse this distinction.

One guesses that the Framers would have been appalled by the thought that "once police action gives way to legal process[,] the Fourth Amendment falls out of the picture." A wrongful arrest deprives a person of what Blackstone called an "absolute right[] . . vested in [him] by the immutable law of nature"— the right of personal liberty. 1 W. Blackstone, *Commentaries* *124. "This personal liberty consists in the power of . . . removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint unless by due course of law." *Id.* at

*134. The denial of this "absolute" right continues until a wrongly detained person is released.

B. THIS COURT'S DECISIONS REJECT THE "VANISHING FOURTH AMENDMENT" VIEW

Just as the Seventh Circuit's position cannot be reconciled with the text or history of the Fourth Amendment, it cannot be reconciled with *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Gerstein* requires a judicial order as a prerequisite to an extended restraint on liberty pending trial, and the restraint authorized by an order follows the order itself. *Gerstein* holds that the Fourth Amendment protects against unwarranted detention throughout the pretrial period, the period at issue in this case. The protection of the Fourth Amendment does not "drop out" when legal process issues.

The Seventh Circuit's position is also inconsistent with this Court's § 1983 decisions. The question on which the Court granted certiorari in this case is "whether an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." Petition for Cert., p. i. The opinion of the Court in *Wallace* invited this phrasing of the question, for the Court wrote: "We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here." 549 U.S. at 390 n.2. *Wallace*'s dictum, however, was inaccurate. This Court *has* "explored the contours of a Fourth Amendment malicious-prosecution suit under

§ 1983." In fact, it already has resolved the question on which it granted certiorari in this case.

As noted above, an arrest warrant constitutes legal process. This warrant supplies the determination of probable cause necessary to justify an extended restraint on liberty prior to trial. When a judge has issued a warrant before an arrest, no "arraignment," "initial appearance," or "*Gerstein* hearing" need be held following the arrest. *Gerstein* itself noted the equivalence of pre-arrest and post-arrest determinations of probable cause. 420 U.S. at 125 (declaring that the determination of probable cause "must be made by a judicial officer either before or promptly after arrest"). Shortly after *Gerstein*, this Court noted, "Since an adversary hearing is not required [when a judicial determination of probable cause follows an arrest], and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Baker v. McCollan*, 443 U.S. 137, 143 (1979).

This Court first held that "an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment" in *Malley v. Briggs*, 475 U.S. 335 (1986). The plaintiffs in *Malley* were taken into custody after legal process issued; they were arrested pursuant to two warrants. Following their arrests, they were

booked, held several hours, arraigned, and released. The charges against them were dismissed when a grand jury refused to return an indictment.

The plaintiffs then filed suit under § 1983 against the police officer who had procured the warrants, alleging that the evidence he presented to the issuing judge fell short of establishing probable cause. *Id.* at 338–39. A federal district court dismissed their complaint, declaring "that the act of the judge in issuing the warrants . . . broke the causal chain" between the police officer's presentation and the plaintiffs' arrests. *Id.* The district court also said that, because the police officer believed the facts he presented to the judge, he might be immune from suit. *Id.* at 339. Both the First Circuit and this Court ordered the plaintiffs' complaint reinstated.

Because the police officer claimed absolute immunity from suit, the Court began its analysis by asking whether the common law would have afforded him immunity at the time § 1983 was enacted. It answered this question no, observing that the officer would have been subject to a suit for malicious prosecution:

> In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.

Id. at 340–41. The Court cited several nineteenth-century malicious prosecution decisions and a nineteenth-century treatise to support this conclusion.

Malley departed from the common law in one respect. The Court did not require the plaintiffs to prove the officer's subjective malice. Instead, it reiterated the objective standard it had established for overcoming an officer's qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982). The plaintiffs would be required to show that "no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S. at 341. The Court declared that this standard "sufficiently serves [the same] goal" as the common law's requirement of malice. *Id.* The Court thus looked to the common law to shape but not define the constitutional tort created by § 1983. Cf. *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978) (observing that although "common law rules, defining the elements of damages and the prerequisites for their recovery, provide the starting point for inquiry under § 1983," these rules may not "provide a complete solution").

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court unanimously reiterated its holding in *Malley*. Although prosecutors generally are absolutely immune from suit, *Kalina* allowed recovery under § 1983 from a prosecutor who made false statements in an affidavit for an arrest warrant. The Court once more held that "an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal

process so as to allow a malicious prosecution claim based upon the Fourth Amendment."

In the present case, an invalid judicial determination of probable cause followed an unlawful arrest; in *Malley* and *Kalina*, it came before. This difference was unimportant historically, and there appears to be no reason why it should matter today. The difference in timing does not in any way distinguish the two cases. Section 1983 and the Fourth Amendment permit recovery from an officer for an unlawful deprivation of liberty that he has persuaded an erring judge to approve; the Fourth Amendment does not "drop out" when legal process issues. *Malley* and *Kalina* are on point in this case.

Indeed, because police officers should be encouraged to seek warrants before making arrests, it would be backwards to cut off the recovery of a suspect arrested without a warrant but not the recovery of a suspect arrested pursuant to a warrant. See *Gerstein*, 420 U.S. at 113 (noting the Court's "preference for the use of arrest warrants when feasible"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes the far less reliable procedure of an after-the-event justification . . . ."). As noted above, there need be no "*Gerstein* hearing" when a suspect is arrested pursuant to a warrant. In the absence of such a hearing, *Malley* and *Kalina* allow this suspect to recover damages for the full period of his unlawful pretrial confinement. This suspect's right to recover is not limited by the issuance of legal

process, something that occurred before his arrest. Allowing this suspect to recover fully while limiting the recovery of a suspect arrested without a warrant and later subjected to legal process looks upside down. Cutting off this second suspect's recovery at the moment of his arraignment protects the officer who has acted without a warrant from the liability *Malley* and *Kalina* impose on an officer who has sought a judge's approval.

CONCLUSION

A NOTE ON UN-EXONERATED PLAINTIFFS

When a common-law plaintiff could not establish the elements of malicious prosecution, he could recover only for whatever unlawful detention preceded the issuance of legal process. For him, the pre-process, post-process line mattered.

A hypothetical case illustrates the limits of the recovery the common law afforded: Officer Rogue arrests Guilty Plaintiff (Innocent Plaintiff's brother) without probable cause on the basis of fabricated evidence. A search incident to the arrest reveals *truthful* evidence that leads to Guilty Plaintiff's detention before trial and then to his conviction and imprisonment. While serving his sentence, Guilty Plaintiff uncovers evidence of Officer Rogue's misconduct. Still imprisoned, he files a § 1983 action, alleging that his imprisonment was a foreseeable and intended consequence of Officer Rogue's violation of the Fourth Amendment.

Unlike Innocent Plaintiff, Guilty Plaintiff could not have recovered at common law for his post-

legal-process detention. He could not have established an element of malicious prosecution, a termination of the criminal proceedings in his favor.

At common law, moreover, not every favorable termination of the criminal proceedings would do. Even if Guilty Plaintiff's conviction and sentence had been vacated on procedural grounds, recovery would be barred. See Dobbs, *supra*, § 434 ("An acquittal of the accused . . . is of course a termination favorable to the accused. Short of that, courts have looked for dispositions that tend to show the accused's innocence or at least a determination that a criminal case could not be proved, saying with Prosser that a mere procedural victory would not suffice."); J. Townshend, *A Treatise on the Wrongs Called Slander and Libel* § 423 at 704 (3th ed. 1877) ("It is certain that the termination should be such as to furnish *prima facie* evidence that the prosecution was unfounded, and was terminated on account of the plaintiff's innocence, or at least was in favor of the plaintiff.").

As noted in Part I–D–1 above, some of the courts of appeals that afford a § 1983 remedy for post-process detention in violation of the Fourth Amendment require a plaintiff to establish only the Fourth Amendment violation. Others require a plaintiff to establish not only this violation but also all the elements of the common-law tort. The conflict is less significant than one might imagine because *Heck* independently bars Guilty Plaintiff's recovery. In *Heck*, this Court analogized *all* § 1983 actions challenging the validity of a conviction or sentence to common law actions for malicious

prosecution, and it applied the common law's favorable-termination requirement to all of them. 512 U.S. at 485–90.

The issues posed by a plaintiff who alleges a violation of his constitutional rights although a common-law doctrine would have blocked his recovery are challenging, but these issues are not currently before the Court. The issue before it is whether the Fourth Amendment should vanish upon the issuance of legal process when this process would *not* have blocked the plaintiff's recovery at common law. This issue is easy.

The Seventh Circuit's view that the Fourth Amendment disappears when legal process issues is inconsistent with history, with the text of the amendment, and with *Gerstein*. Moreover, in *Malley* and *Kalina*, this Court ruled that an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based on the Fourth Amendment. The Court has already decided this case.

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IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. Many of DRI's members regularly represent governmental entities in litigation under Section 1983. To pursue the interests of these members, DRI has a standing Government Liability Committee, whose primary focus is Section 1983 litigation.

DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense attorneys. As part of this mission, DRI pursues issues of import to the defense bar, seeking to address issues that are critical to defense attorneys and their clients, with an ultimate goal of improving the civil justice system. Thus, DRI participates as amicus curiae in cases raising issues of importance to its membership, such as this case, which threatens to increase governmental liability by expanding the Fourth Amendment beyond its text and meaning to fill a perceived gap in civil liability for government officials.

This case is of interest to DRI because it asks the Court to expand tort liability under the Fourth

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae DRI certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the amicus, its members, and its counsel made a monetary contribution intended to fund preparation or submission of this brief. Both counsel of record have consented to the filing of this brief.

Amendment in ways that will blur the amendment's meaning and unnecessarily extend the time frame of liability for state and local governments. The issue is whether a section 1983 claim premised on an alleged violation of the Fourth Amendment can subject police officers, and by extension their governmental employers, to liability for post-arrest actions that do not qualify as "searches" or "seizures." The issue arises in the context of a so-called Fourth Amendment malicious prosecution claim by which the petitioner claims he was unlawfully detained based on fabricated evidence. But the petitioner does not ask this Court to rule that claims for false arrest and false imprisonment are cognizable under the Fourth Amendment. Of course they are. Rather, the petitioner seeks a Fourth Amendment remedy for malicious prosecution—the act of asserting baseless criminal charges with malice.

There is no place in the Fourth Amendment for any claim that requires proof of malice as an element. Nor is there any place for a Fourth Amendment malicious prosecution theory to police the act of prosecuting someone. All parties—but particularly state and local governments that must train officers, anticipate liability, and set policy—benefit from a predictable set of constitutional rules that are guided by the text of particular amendments and the Court's precedents, rather than the unpredictability of using an elastic Fourth Amendment to create a new section 1983 claim based upon the common law of malicious prosecution. This case represents an attempt at drastic departure from the text of the Fourth Amendment and surrounding precedents in order to create a new constitutional

claim to remedy a purported injury that already has protections both in the Constitution and at common law. Because section 1983 authorizes money damages against government entities, *see Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), expanding Fourth Amendment-based section 1983 claims to encompass malicious prosecution transforms both section 1983 and the Amendment into a "font of tort law"—something this Court has warned must not be allowed to occur. *Paul* v. *Davis*, 424 U.S. 693, 700-01 (1976). And if the petitioner is successful, the precedent will discourage officers, and the departments who train them, from applying the full extent of their authority to protect law-abiding citizens.

In sum, DRI and its members seek to promote adherence to fundamental principles of constitutional and statutory interpretation, in order to prevent the Bill of Rights from being treated as an ethereal common law doctrine that may be bent to the will of a moment to right every perceived wrong.

SUMMARY OF ARGUMENT

Petitioner seeks to stretch the Fourth Amendment's reach beyond its text and history as a solution in search of a problem. Illinois recognizes a common law malicious prosecution claim, and Elijah Manuel does not explain why that claim is unsatisfactory as a general matter. Rather, he asks this Court to take a common law claim and create a cause of action for it under the Fourth Amendment without statutory or constitutional imprimatur.

The evolution of malicious prosecution as a tort demonstrates why it cannot be shoehorned it into the

Fourth Amendment. Malicious prosecution is over a thousand years old and is rooted in the Anglo-Saxon punishment of cutting out one's tongue for a false accusation of criminal activity Over time, the punishments changed, and the claim was distilled into a four-part test focused on (1) improper institution of criminal proceedings, and (2) malice.

The Fourth Amendment is a poor vehicle for punishing malice or policing prosecution. The Court has been consistent and clear that the Fourth Amendment's proscription of "unreasonable searches and seizures" states an objective standard, and officers' subjective intentions are irrelevant to any claim under the Fourth Amendment. Importing a malicious prosecution claim requiring proof of subjective intent would require carving out an exception to that rule after decades of strict adherence.

Moreover, the petitioner here attempts to blur the distinction between false imprisonment and malicious prosecution by trying to import malicious prosecution into the Fourth Amendment. The elements of malicious prosecution do not include any aspect of a search or a seizure. They are irrelevant. In the common law, an action for malicious prosecution will lie regardless of whether the criminal defendant was seized. But the petitioner asks the Court to modify it to be a duplicative claim for false imprisonment with a longer statute of limitations. This Court did not endorse such an end-run around proper pleading in *Albright v. Oliver*, 510 U.S. 266 (1994), and it should not start down the path of resolving any concerns over the statute of limitations for false imprisonment by expanding the

Fourth Amendment to include a malicious prosecution claim that does not belong.

The results of such an expansion would be severely damaging to states and municipalities. They would have little or no way to anticipate the scope of liability for police officers in light of the blurring of the heretofore clear requirement that search and seizure claims be based on objective analysis of the facts before the officers. It will create a further incentive for law enforcement departments to train police to avoid using the full extent of their authority, knowing that a prosecution that is out of their hands can lead to liability based on the evidence of an officer's subjective intent that is pieced together years later.

The judgment below should be affirmed.

ARGUMENT

I. ESTABLISHING MALICIOUS PROSECUTION INELUCTABLY REQUIRES PROOF OF MALICE AND IS INDEPENDENT OF SEARCH AND SEIZURE.

Malicious prosecution, by its very name, asserts an *abuse of process* with *malice*. Its history and development over the past millennium has focused on refining those two factors, while balancing the interests of the accused, the victim, and law enforcement.

Exacting penalties for malicious prosecution began over a thousand years ago. "Anglo-Saxon courts have been concerned with malicious prosecution since at least the tenth and eleventh centuries, when the price of losing a civil lawsuit was

the forfeiture of one's tongue." John T. Ryan, Jr., *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 Geo. Wash. L. Rev. 776, 778 (1996). Judges found wrongful prosecutions to be abhorrent, and an "'aggravated form of defamation.'" Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in §1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439, 443 (2002) (citation omitted). So any failed prosecution was considered an abuse of process. And regardless of any detention, pre-trial punishment, or otherwise, instigating the prosecution itself was the offense.

Unfortunately, "[a] central problem of these early regimes is that they did not distinguish between the honest, well-meaning false accuser and she who brought a false charge to defame the accused." *Id.* The system was designed without the possibility of recognizing the existence of the honestly mistaken accuser, because of the system's purportedly divine sanction. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1222 (1979).

From these beginnings, the nature of a claim of malicious prosecution changed over time. Schillaci, 97 Nw. U. L. Rev. at 443. Changes to the punishment preceded changes to the procedure. First, the punishment evolved to require an unsuccessful accuser to pay a fine or face imprisonment—somewhat less Draconian than losing one's tongue. *Id.* at 443-44. Then, "amercement" arose as a refinement to the system of punishment, linking the fine to the harm done to the party accused in the malicious prosecution. Note, *Groundless Litigation*, 88 Yale L.J. at 1222.

Liability for malicious prosecution remained tied in as part of the original proceeding, and almost all unsuccessful accusers still were found to have committed malicious prosecution. *Id.* But that system tied the fine to the harm done to the accused party. *Id.* Still, the amercement system did not compensate wronged defendants. *Id.*

Next, the English introduced a further procedural element to protect the well-meaning false accuser. Schillaci, 97 Nw. U. L. Rev. at 444. They legislated a "good cause" requirement, which established that the accused could not recover from the accuser if the accused was indicted. *Id.* This may have overshot the mark, as findings of malicious prosecution dropped, though primarily because wealthy people began paying proxies—straw-parties—to assert their accusations. *Id.*

To combat this trend, a system based on a writ of conspiracy that operated in straw-party actions brought by proxy parties to ensure that amercement penalties could be levied against the accuser as well as his straw party bringing the suit. Note, *Groundless Litigation*, 88 Yale L.J. at 1224. Conspiracy only operated in cases involving straw-party actions, but significantly, it introduced compensation to victims of groundless prosecutions and the requirement of malice. *Id.* at 1224-25.

Over time, resistance to a plain tort of malicious prosecution faded. *Id.* at 1226-27 Parliament passed laws to create and broaden rights to taxation of costs against unsuccessful accusers. *Id.* Still, there was no remedy by which a wrongly accused person could recover damages for the injuries he or she suffered as a result of a wrongful prosecution. *Id.* This persisted almost to the end of the

Seventeenth Century. *Id.* at 1228.

In 1698, Lord Holt adopted a common law method for obtaining special damages that "established the guidelines that have become the modern English Rule" of common law malicious prosecution claims. *Id.* at 1228-29. Judges had been reticent to adopt a broad-reach malicious prosecution claim because of the deterrent effect on victims of crimes. Schillaci, 97 Nw. U. L. Rev. at 443. In light of this concern, establishing a claim for malicious prosecution has subsequently required clearing a high bar. Laurie Edelstein, *An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth Century England*, 42 Am. J. Legal Hist. 351, 358 (1998) ("Because of the procedural obstacles to maintaining an action for malicious prosecution, few victims of malicious proceedings brought such a claim.")

As malicious prosecution law developed in Eighteenth Century England, judges identified "three principal motives in bringing a malicious accusation: revenge, forestalling legitimate prosecutions, and monetary gain." Edelstein, 42 Am. J. Legal Hist. at 358. This led to malicious prosecutions generally falling into three categories: (1) people of middle rank suing each other pursing personal or commercial disputes, (2) prosecutions by masters against servants to avoid payments owed, and (3) prosecutions by poor people "against their social superiors." *Id.* at 358-59.

This greater understanding of the motivation for malicious prosecution set the path toward modern malicious prosecution doctrine. The modern view acknowledges that the availability of recovery for malicious prosecution deters groundless suits. Ryan,

64 Geo. Wash. L. Rev. at 779. But a malicious prosecution claim with low standards of proof —that, for example, does not require proof of malice—would significantly deter litigation by accusers who cannot afford a subsequent malicious prosecution suit if he or she is unsuccessful. *Id.* ("Those in support of the more stringent 'English Rule' speak of the need to protect honest litigants from reprisal and to resolve litigation fairly and expediently"). Thus, modern malicious prosecution theory must balance four competing policy interests—encouraging honest accusers, resolving litigation quickly and finally, deterring groundless suits, and compensating victims of groundless suits. Note, *Groundless Litigation*, 88 Yale L.J. at 1220.

After the Revolutionary War, several states adopted the now-evolved version of English common law malicious prosecution, Schillaci, 97 Nw. U. L. Rev at 445, while the parallel structure of charging costs—still extant in England—faded away in the new Republic, Note, *Groundless litigation*, 88 Yale L.J. at 1229. The claim has four elements: (1) institution of a criminal proceeding by the defendant, (2) termination of the proceeding in the plaintiff's favor, (3) a lack of probable cause to support the charges, and (4) malice. Schillaci, 97 Nw. U. L. Rev. at 445. Liability turns on the existence of the criminal proceeding itself, not on whether the defendant's freedom was restrained during the process. There is no search or seizure requirement. And as the punishment has evolved and the elements have evolved, the only thing that separates liability now from the problematic original formulation that "did not distinguish between the honest, well-meaning false accuser and she who brought a false charge to defame the accused," *id.* at

443, is the requirement of proving the defendant's subjective state of mind—his or her intent to initiate a prosecution for reasons other than bringing a criminal offender to justice.

Thus, proving malice-in-fact—meaning that the defendant's primary purpose in bringing the prior action was not bringing the offender to justice—is a critical component of malicious prosecution claims. Ryan, 64 Geo. Wash. L. Rev. at 779. The plaintiff must establish something more than simply a lack of probable cause, and some jurisdictions go further and require the plaintiff to prove special damages. *Id.*

The American system places great weight on the interest in encouraging honest victims to bring their accusations into the legal system so that it can determine guilt or innocence through investigation, indictment, and trial. Jody M. Offutt, *Expanding Attorney Liability to Third Party Adversaries for Negligence*, 107 W Va. L. Rev. 553, 560-61 (2005) ("Public policy requires that people be able to freely resort to courts for redress of a wrong and the law should protect them when they commence a civil suit or criminal action in good faith and on reasonable grounds."). And for one who *abuses the process* by *maliciously* duping the parties to the system, the tort of malicious prosecution exists in the common law. Its millennium-long evolution places its proper balance at allowing recovery only when the accuser—be it a police officer or a private citizen—is proven to have harbored ill will, and only for the actual abuse of the process, leaving issues ancillary to abuse of the criminal process to other claims.

II. THE FOURTH AMENDMENT SHOULD NOT BE A VEHICLE FOR LOWERING THE BAR ON MALICIOUS PROSECUTION CLAIMS.

Malicious prosecution claims now, finally, strike the right balance among the competing interests in unsuccessful criminal litigation. Yet Petitioner asks this Court to stretch the Fourth Amendment beyond recognition to encompass a form of malicious prosecution that is essentially a duplicative claim for false imprisonment with a longer statute of limitations. The impropriety of expanding the Fourth Amendment to encompass malicious prosecution claims is evident in each of the two words that describe the claim: this Court's precedents leave no place for malice to become an element of a Fourth Amendment claim, nor does the Fourth Amendment even purport—under its plain language or this Court's precedents—to police a decision to prosecute and continue prosecution.

Given the malice requirement, malicious prosecution claims are particularly unsuitable for treatment under the Fourth Amendment. The Fourth Amendment protects people from "unreasonable searches and seizures." Because a search or seizure must be "unreasonable" to support a Fourth Amendment claim, Fourth Amendment analysis must focus on objective factors, rather than subjective intent. *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) ("Whatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be, the fact remains that the

'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment").

The United States as amicus curiae admirably attempts to cabin the danger here by suggesting that the Court should import something akin to a malice requirement of the elements of state common law claims for malicious prosecution from *Franks* v. *Delaware*, 438 U.S. 154 (1978). Br. of Amicus Curiae United States of America at 23-29. But that solution, untethered to the text or history of the Fourth Amendment, presents its own danger. It attempts to stretch a precedent based on the "oath or affirmation" requirement of the warrant clause, *Franks*, 438 U.S. at 172—which carries a "good faith" requirement, *United States* v *Calderon*, 438 U.S. 160, 164 (1954), over to the search and seizure clause, which has no such requirement. The United States offers no limiting principle that would prevent a departure from the Fourth Amendment's text not only in the malicious prosecution context, but in other contexts. Br. of United States at 25. There is no such limiting principle.

To make the position seem more reasonable, the United States asserts that a plaintiff has a constitutional right to be free of wrongful pretrial detention. Br. of the United States at 11. But when the United States asserts that "what is actionable under the Fourth Amendment is not the decision to pursue criminal charges, but only petitioner's detention absent a valid probable cause determination," it moves the ball on the question presented. The petitioner here does not ask this

Court to determine whether false arrest or unlawful detention is cognizable under the Fourth Amendment. The question presented is whether the Constitution "allow(s) a malicious prosecution claim based upon the Fourth Amendment." Br. of Pet. i. And a claim for malicious prosecution has nothing to do with whether a person was subject to pretrial detention.

The irrelevance of search and seizure to liability for malicious prosecution is evident in the second word of the tort: prosecution. Neither a search nor a seizure is an element of the common law malicious prosecution tort. Rather, the tort of malicious prosecution arises from initiation and pursuit of a criminal proceeding without probable cause.

To the extent Petitioner claims his injury is pretrial detention, that is simply not a malicious prosecution claim. And Petitioner has not asked the Court to determine whether there is a false arrest or false imprisonment claim under the Fourth Amendment. The petitioner apparently is unable to raise those claims based on the applicable statutes of limitations. Br. of Pet. at 9. But the fact that Petitioner was unfortunately unable to raise his claims in a timely manner, regardless of the reason, is no justification for this Court to render the Fourth Amendment so malleable as to embrace a claim that requires malice and has nothing to do with whether there was a search or a seizure. Nor is it justification for the Court to turn malicious prosecution into an amorphous claim that is coextensive with false imprisonment but conveniently has a longer statute of limitations.

The Court has not held otherwise. Contrary to Petitioner's assertion, Br. of Pet. at 8, the Plurality

did not hold the Fourth Amendment is applicable to malicious prosecution claims in *Albright*. In *Albright*, the petitioner asserted that he could raise section 1983 claims against prosecution-without-probable-cause as a substantive due process right. 510 U.S. at 268. The Court disagreed. The plurality initially noted the Court's reluctance to expand substantive due process. *Id.* at 271. It the ruled that "substantive due process, with its 'scarce and open-ended' 'guideposts,' can afford him no relief." *Id.* at 275 (citation omitted).

While discussing the petitioner's claim, the plurality noted that the Fourth Amendment is proper to address "pretrial deprivations of liberty." *Id.* at 274. The plurality suggested that the petitioner's claim was really more of a false arrest or false imprisonment claim as a Fourth Amendment matter, insofar as the petitioner sought compensation for not only being charged, but having "submitted himself to arrest." *Id.*

The plurality further noted there is no constitutional protection against the decision to prosecute—a central question in a malicious prosecution claim. *Id.* Ultimately, the question of whether a malicious prosecution claim is cognizable under the Fourth Amendment was not resolved.

In concurrence, Justice Scalia noted that the process "due" with respect to pre-trial deprivations of liberty likely are concomitant with the protections for the act of seizing someone under the Fourth Amendment. *Id.* at 275. But Justice Scalia further noted that it was unnecessary for the Court to resolve whether a malicious prosecution claim might exist under the Due Process clause as a procedural matter because the petitioner had not invoked the

right to "procedural" due process. *Id.* Moreover, Justice Scalia pointed to the Fifth and Sixth Amendments, not a Fourth Amendment expanded to encompass malicious prosecution, as the source of "procedural guarantees relating to the period before and during trial." *Id.* Similarly, Justice Kennedy wrote in concurrence, joined by Justice Thomas, that "Albright's due process claim concerns not his arrest but instead the malicious initiation of a baseless criminal prosecution against him." *Id.* at 281. Justice Souter, too, focused on the fact that petitioner's "malicious prosecution" claim actually only asserted injuries associated with being taken into custody, rather than the prosecution itself. *Id.* at 289. And in dissent, Justice Stevens, joined by Justice Blackmun, stated that the petitioner had a viable Fifth Amendment claim based on "a requirement that criminal prosecution be predicated, at a minimum, on a finding of probable cause." *Id.* at 296.

So while many assert that "[t]he central holding in *Albright* was that the Fourth Amendment was a natural home for the tort of malicious prosecution," Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 Va. L. Rev. 1653, 1655 (2013), that ultimately is not correct. The plurality's holding was only that that plaintiff had not stated a substantive due process claim. *Albright*, 510 U.S. at 275. And between the plurality and concurrences, a majority of the Court stated that a claim based on the prosecution itself does not arise under the Fourth Amendment, but rather, that the Fourth Amendment protects against any concomitant seizure.

If a malicious prosecution claim may fit under any provision of the constitution, it is the Due Process clause. Ryan, 64 Geo. Wash. L. Rev. at 809. "The essence of a malicious prosecution claim for deprivation of due process under § 1983 is that an official, acting under color of state law, initiated a prosecution against an innocent individual, without probable cause, and with malice." *Id.* at 812. And any such claim would come with the limitations inherent to the Due Process clause. *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

Nor should the Court take the drastic step of creating a Fourth Amendment malicious prosecution claim to fill a perceived gap in constitutional coverage. Shoehorning malicious prosecution claims into the Fourth Amendment will not provide any significant advantage over state law claims for malicious prosecution. "Damage awards available for common law malicious prosecution actions have been historically equivalent to that of the § 1983 alternative" in circuits in which the courts have created a malicious prosecution remedy under the Fourth Amendment. Charissa Eckhout, Note, *Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis*, 82 Den. L. Rev. 499, 515 (2005). And in light of the similar pleading and proof standards between federal and state courts, the only significant difference between a federal and state cause of action for malicious prosecution is the potential availability of attorney's fees in federal court. *Id.*

The disadvantages of this tack would be great. Police departments will be reticent to do anything that could expand their tort liability. And given the possibility of liability for an act outside of their

control—the choice to prosecute—on an issue that will hinge on an officer's subjective state of mind as adjudged years later, they will be forced to train officers to at least hesitate before using their full authority. Placing such handcuffs on police officers as they face life and death situations on a daily basis only serves to risk their safety, and the safety of the citizens they are working to protect.

"The line between constitutional and non-constitutional violations has become increasingly blurred, as more and more litigants are attempting to frame their injuries from official conduct as constitutional violations." Kossis, 99 Va. L. Rev. at 1655. But not every injury is a constitutional violation, nor should it be. Nor is the Fourth Amendment a vehicle for adopting and modifying common law torts. "Petitioner's claim for damages here targets only his pretrial detention." Br. of United States at 21. That is not malicious prosecution, and the petitioner could not or did not timely present a claim for false imprisonment. This case presents a significant risk of further blurring the boundaries of constitutional protections. To avoid rendering the Bill of Rights into an ethereal outline of federal common law, the Court should reject the effort here to impose the Constitution as a remedy for every harm.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

ELIJAH MANUEL,

PETITIONER,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, COLORADO, HAWAII, KANSAS, MISSISSIPPI, MISSOURI, OHIO, SOUTH CAROLINA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Illinois and eight States submit this brief in support of Respondents to urge affirmance of the judgment of the United States Court of Appeals for the Seventh Circuit in *Manuel v. City of Joliet, Ill..*, 590 Fed App'x 641 (7th Cir. 2015). Petitioner asks this Court to declare that a very specific version of a malicious prosecution claim is housed in the Fourth Amendment and thus can be brought under § 1983. But, as the Seventh Circuit below recognized, the Fourth Amendment is not a proper fit for such a claim. A malicious prosecution claim, by its nature, is focused on a prosecution, which is outside the ambit of the Fourth Amendment.

Whatever label Petitioner asks this Court to attach to his new constitutional tort, it is an indispensable element to him that the tort accrues upon the successful termination of his prosecution (for otherwise his particular claim would be time barred). This highlights that the focus of Petitioner's claim is on the prosecution and use of the legal process and therefore underscores the fact that the Fourth Amendment is not the proper home for his claim. Moreover, malicious prosecution, by definition, requires a finding of malice. But such a subjective inquiry has no place in Fourth Amendment jurisprudence.

The *Amici* States have three important interests implicated by this case. First, this case presents the question of the proper standards by which to hold law

enforcement officers accountable for unauthorized torts committed during the investigation and prosecution of criminal activity. The *Amici* States are interested in this question because they have law enforcement agencies whose sworn officers participate in the investigation and prosecution of tens of thousands of cases per year. Indeed, at the time of the most recent census, the primary state law enforcement agencies alone employed over 60,000 sworn personnel. U.S. Dep't of Justice, *Census of State and Local Law Enforcement Agencies* 7 (2008). The States, then, have a strong interest in the federal constitutional standards governing the conduct of these many state employees.

Second, the *Amici* States have an interest in developing and applying their own remedies for malicious prosecution claims. Such claims invoke historically local concerns within the traditional province of the States—the conduct of officers exercising local police power and the potential abuse of local judicial processes. And the malicious prosecution tort involves a delicate balancing of interests between an individual's right to recover for abuse of process and the compelling government interest in not chilling law enforcement officers in the exercise of their duties. As this Court recognized in *Parratt v. Taylor*, 451 U.S. 527 (1981), where the question is whether an individual has been denied process by the unauthorized, unpredictable action of a state officer, the court should determine whether the process the State provides is sufficient to remedy any harms, and if so there is no due process

claim. This focus first on the adequacy of state-provided remedies dignifies local responses to local concerns.

And third, the *Amici* States have a strong interest in swiftly uncovering and timely addressing unauthorized conduct by their state law enforcement officials as well as by local law enforcement officials within the State. By their nature, these unauthorized actions are often difficult to detect. The claim as Petitioner insists on presenting it, however, undermines the important societal interest in quickly addressing misconduct because waiting until the successful termination of the prosecution to bring the § 1983 action could take years.

SUMMARY OF ARGUMENT

This Court should reject Petitioner's invitation to declare that a § 1983 malicious prosecution claim can be grounded in the Fourth Amendment. The Fourth Amendment is concerned with searches and seizures, not alleged abuses of legal proceedings. Rather, when process in the course of a prosecution allegedly has been abused, due process principles come into play.

Moreover, the malicious prosecution tort is comprised of elements that reflect a difficult balance that acknowledges the competing interests at stake. While the law recognizes that injuries should be redressed, it also recognizes that malicious prosecution lawsuits could damage the public interest by chilling law enforcement. But any effort to squeeze a malicious prosecution claim into the Fourth Amendment would require abandonment of the traditional elements of the claim, thus upsetting the delicate balancing of those interests. For instance, as its name suggests, malice is an essential element of a malicious prosecution. But the Fourth Amendment does not permit the subjective inquiry necessary to analyze a defendant's state of mind because that Amendment's focus is on the objective reasonableness of searches and seizures.

Because the Due Process Clause is the better fit for any § 1983 malicious prosecution claim, *Parratt v. Taylor* instructs that the Court should look to state law to determine whether the State offers an adequate postdeprivation remedy, most often in the form of a

malicious prosecution tort action. If that remedy is adequate, then no § 1983 action is available. But if the state remedy is not adequate, then the Due Process clause provides a constitutional backstop. This focus on the adequacy of postdeprivation process in cases involving the random and unauthorized acts of officers is consistent with the standard due process analysis set forth in *Mathews v. Eldridge*. And this framework serves the Court's interest in observing the line between traditional torts and constitutional claims. Moreover, with the focus first on the adequacy of state remedies, this analysis gives effect to the State's strong interests in providing remedies to redress abuses of legal proceedings, which is something well within the States' traditional province.

ARGUMENT

I. Any Constitutional Claim For Malicious Prosecution Is Located Only In The Due Process Clause.

The Due Process Clause, rather than the Fourth Amendment's protection against unreasonable seizures, is the proper constitutional source for a malicious prosecution claim.

A. The Fourth Amendment is an improper fit for a malicious prosecution claim.

This Court has made clear that the Fourth Amendment is concerned with searches and seizures, and not with prosecutions. *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (explaining that, in the Fourth Amendment context, "we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute"). Indeed, this Court has recognized that the nature of an individual's injury from detention without legal process is "entirely distinct" from the injury caused by wrongful institution or ongoing prosecution of legal proceedings. *Wallace v. Kato*, 549 U.S. 384, 389-90 (2007). And tort law bears out this distinction: "Typically, a warrantless deprivation of liberty from the moment of arrest to the time of arraignment will find its analog in the tort of false arrest, while the tort of malicious prosecution will

implicate postarraignment deprivations of liberty." 54 C.J.S. Malicious Prosecution, § 4.

Thus, the Fourth Amendment is concerned with injuries or deprivations prior to the institution of legal process, while the Due Process Clause is concerned with deprivations caused by inadequacies in or abuse of the prosecution once instituted. *See Cordova v. City of Albuquerque*, 816 F.3d 645, 663 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (explaining that this Court treats "the post-arraignment, pre-trial detention process as the province of the Fifth and Fourteenth—and not the Fourth—Amendment").

In addition, when it comes to searches and seizures, "reasonableness is always the touchstone of Fourth Amendment analysis." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016). The test under the Fourth Amendment asks "whether 'the circumstances, *viewed objectively*, justify the challenged action.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)) (emphasis added and internal brackets removed).

This objective inquiry is inconsistent with an action for malicious prosecution. The elements of a common law malicious prosecution tort claim reflect the balance between the competing "individual interest in freedom from unjustifiable litigation and the social interest in supporting resort to law." W. Keeton, et al., *Prosser & Keeton on Torts* § 119, at 871 (5th ed. 1984);

see Hunt v. Lawson, 2008 WL 4691052, *5 (Ky. Oct. 23, 2008); *see also Ims v. Town of Portsmouth*, 32 A.3d 914, 922 (R.I. 2011) (malicious prosecution actions "tend[ ] to deter the prosecution of crimes and/or chill free access to the courts") (internal quotation marks omitted). "These interests are balanced by carefully defining the elements of an action for malicious prosecution, and the balance is maintained by strictly adhering to these elements." *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 291 (Tex. 1994). Therefore, "[e]ven a small departure from the exact prerequisites for liability may threaten the delicate balance between protecting against wrongful prosecution and encouraging reporting of criminal conduct." *Id.*; *see also Hunt*, 2008 WL 4691052, at *5.

The elements of the malicious prosecution tort include "'[m]alice,' or a primary purpose other than that of bringing an offender to justice."[1] W. Keeton et al., at 871. To evaluate the malice requirement, the court must determine why an individual initiated the underlying proceeding. Thus, the court engages in a subjective inquiry into the defendant's state of mind, not an objective inquiry into the reasonableness of

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[1] The traditional elements of a common law malicious prosecution tort are that a criminal proceeding was instituted by the defendant against the plaintiff, the proceeding terminated in the plaintiff's favor, there was no probable cause for the proceeding, and the defendant had malice or an improper purpose in bringing the proceeding. W. Keeton et al., at 871.

defendant's conduct. *See* Restatement of Torts (Second) § 668 cmt. c; *see also, e.g.*, *Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 260, 292 (Cal. 2006) ("The 'malice' element relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action.") (internal quotation marks and ellipsis omitted, emphasis in original); *Miles v. Paul Moak of Ridgeland, Inc.*, 113 So. 3d 580, 586 (Miss. Ct. App. 2012) ("Unlike probable cause, the malice inquiry focuses primarily on the defendant's subjective state of mind at the time he filed the criminal action.").

The subjective inquiry into the defendant's actual state of mind in a malicious prosecution case stands in sharp contrast to the objective reasonableness inquiry that is a hallmark of Fourth Amendment-based torts. For a malicious prosecution claim, for example, if the person initiating a criminal prosecution does not believe in the guilt of the accused, he does not have a proper purpose "even though the facts within his knowledge or the information in his possession are such as might lead a reasonable man to believe that the accused had committed the offense charged against him." Restatement of Torts (Second) § 668 cmt. e. In the Fourth Amendment context, however, a plaintiff cannot prevail in a § 1983 suit unless the officer was objectively unreasonable regardless of any malicious intent. *See Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Tyree v. U.S.*, 417 Fed. App'x 364, 366 (4th Cir. 2011) (explaining that "the probable cause determination is an objective one" but "discovery into the officer's

subjective state of mind may have relevance to the malice element of her malicious prosecution claim"); *Roberts v. Fed. Exp. Corp.*, 842 S.W.3d 246, 248 (Tenn. 1992) ("Whereas malice concerns the subjective mental state of the prosecutor, appraisal of probable cause necessitates an objective determination of the reasonableness of the prosecutor's conduct in light of the surrounding facts and circumstances.").[2]

In sum, the malicious prosecution tort's focus on legal processes and its subjective component rule out the Fourth Amendment as the basis of a constitutional malicious prosecution claim.

B. The Due Process Clause is a better fit for a malicious prosecution claim.

Rather than the Fourth Amendment, with its focus on searches and seizures as opposed to prosecutions, the proper basis for a constitutional claim that a prosecution was improper is the Due Process Clause. A malicious prosecution claim asserts that the judicial *process* or legal *procedure* has been misused. *See* Keeton et al., at 870-71. It requires the institution of a "proceeding." *Id.*; *see* Dan B. Dobbs, *The Law of Torts* § 431 at 1216-18 (2000). Because the Due Process Clause "is concerned with the substantial fairness of

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[2] Additionally, as Respondents explain, the favorable termination element of the malicious prosecution tort cannot be accommodated by the Fourth Amendment. *See* Resp. Br. at 20-24.

legal procedures," *Allen v. U.S. Fid. & Guar. Co.*, 342 F.2d 951, 956 (9th Cir. 1965), a claim focused on the impropriety or inadequacy of procedures is grounded in that Clause, *see Baker v. McCollan*, 443 U.S. 137, 142 (1979). Under the procedural due process analysis, "our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate postdeprivation remedy." *Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring in judgment) (citing *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981); *Hudson v. Palmer*, 468 U.S. 517, 531-36 (1984); *Ingraham v. Wright*, 430 U.S. 651, 674-82 (1977)).

1. *Parratt* and its progeny establish that a due process claim alleging random and unauthorized acts cannot survive so long as there is adequate post-deprivation process.

Petitioner's malicious prosecution claim fits well within the principle of *Parratt v. Taylor*. In *Parratt*, an inmate of a Nebraska state prison sued prison officials under § 1983 because some of his property was lost when the officials failed to follow the prison's procedure for handling inmate mail. 451 U.S. at 530-31. The Court noted that the inmate's claim met three prerequisites of a valid due process claim because prison officials acting under color of state law had deprived him of his property. *Id.* at 536-37. But that was insufficient to bring a § 1983 claim because the Due Process Clause

"protects only against deprivations without due process of law." *Id.* at 537 (internal quotation marks omitted). The inmate's loss of property did not occur as the result an established state procedure, but rather as the result of the unauthorized failure of state agents to follow official procedure. *Id.* at 543. In those circumstances, it was impracticable for the State to provide a predeprivation remedy. *Id.* Therefore, because the inquiry "must focus on whether the respondent has suffered a deprivation of property without due process of law," the Court was required to determine "whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Id.* at 537.

This Court subsequently extended *Parratt* from unauthorized negligent conduct to intentional deprivations of property in *Hudson*, 468 U.S. at 533. The Court explained that a State "can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.* Thus, "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause" if "a meaningful postdeprivation remedy for the loss is available." *Id.* That is because "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." *Id.* Then, in *Zinermon v. Burch*, 494 U.S. 113, 132 (1990), this Court extended *Parratt* to intentional deprivations of

liberty. *See also Betterman v. Montana*, 136 S. Ct. 1609, 1618-19 (2016) (Thomas, J., concurring) ("The Due Process Clause can be satisfied where a State has adequate procedures to redress an improper deprivation of liberty or property.") (citing *Parratt*, 451 U.S. at 537).

The jurisprudential pillars upon which the *Parratt* rule rests are strong. First, *Parratt* acknowledges the Court's role in interpreting the Constitution, but also "reflects [the Court's] continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.'" *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 768-69 (2005) (quoting *Parratt*, 451 U.S. at 544, in turn quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Pursuant to this limiting principle, the Court recognizes that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Accordingly, the Court has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992); *see Baker*, 443 U.S. at 146 (explaining difference between § 1983 remedies for constitutional violations and state remedies under traditional tort-law principles). In warning against constitutionalizing common law torts, this Court has explained that "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they

do not address the same concerns." *Daniels*, 474 U.S. at 333.

Second, *Parratt* is consistent with the test, set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what procedures are constitutionally required. Under *Mathews*, the process due in a given circumstance is determined by weighing the private interest affected, the risk of an erroneous deprivation of such interest through the procedures used and the value of additional or other procedures, and the government's interest, including the burdens that other procedures would entail. *Id.* at 335. In cases within the scope of the *Parratt* rule, involving random and unauthorized deprivations by state employees, "the State cannot possibly provide a meaningful predeprivation hearing, and therefore adequate postdeprivation state remedies may satisfy the procedural requirements of the Due Process Clause." *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1022 (1985). *Parratt* "represent[s] a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." *Zinermon*, 494 U.S. at 128; *see id.* at 129 (*Parratt* is an application of *Mathews* in "the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue").

Third, as Justice Kennedy recognized in *Albright*, *Parratt* "respects the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." 510 U.S. at 284 (Kennedy, J., concurring in the judgment). *Parratt* thus embraces notions of comity and federalism that lie at the heart of our nation's judicial system. *See Cordova*, 816 F.3d at 664-65 (Gorsuch, J., concurring in the judgment) ("[O]ut of respect for considerations of judicial modesty, efficiency, federalism, and comity, the Supreme Court in procedural due process cases generally encourages federal courts to abstain in favor of state common law remedial processes than try to recreate them in the name of the Constitution.").

Respect for this balance, in turn, is consistent with this Court's admonition that States "are free to serve as experimental laboratories" in crafting solutions to deal with local concerns, including law enforcement problems. *Arizona v. Evans*, 514 U.S. 1, 7-8 (1995); *see id.* at 24 (Ginsburg, J., dissenting) (recognizing importance of "States' ability to serve as laboratories for testing solutions to novel legal problems"); *see also Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (reiterating importance of States serving as "laboratories for experimentation"); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 957 (2016) (Ginsburg, J., dissenting) ("But state-law diversity is a hallmark of our

political system and has been lauded in this Court's opinions."); *Kansas v. Carr*, 136 S. Ct. 633, 646 (2016) (Sotomayor, J., dissenting) (explaining that States should be allowed to serve "as necessary laboratories for experimenting with how best to guarantee defendants a fair trial").

2. Malicious prosecution claims are governed by the *Parratt* rule.

In *Albright*, a plurality of this Court held that there was no substantive due process right "to be free from criminal prosecution except upon probable cause." 510 U.S. at 268 (Rehnquist, J., plurality); *see id.* at 281 (Kennedy, J., concurring in the judgment); *id.* at 286 (Souter, J., concurring in the judgment). The plurality, however, did not address whether a malicious prosecution claim could be brought under the Constitution. But Justice Kennedy, joined by Justice Thomas, concurred in the judgment and explained that the petitioner's "due process claim concerns not his arrest but instead the malicious initiation of a baseless criminal prosecution against him." *Id.* at 281 (Kennedy, J., concurring in judgment). Justice Kennedy noted that a malicious prosecution "can cause unjustified torment and anguish" and assumed *arguendo* that "some of the interests granted historical protection by the common law of torts," such as the interest in freedom from malicious prosecution, "are protected by the Due Process Clause." *Id.* at 283-84.

Emphasizing the "clarity of the *Parratt* rule," Justice Kennedy explained that "[i]n the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*.'" *Id.* at 285 (quoting *Parratt*, 451 U.S. at 536). The opinion noted, however, that if the relevant state law did not provide an adequate postdeprivation remedy, then a § 1983 malicious prosecution suit under the Due Process Clause might be proper.[3] *Id.* at 286.

Application of *Parratt* in this context focuses on the adequacy of state remedies—it permits States to craft their own solutions to the problems associated with abuse of the legal process. As discussed, these solutions require a delicate balancing between competing interests including both the desire to redress injuries and the need to avoid chilling law enforcement. As this Court "has long recognized[,] the role of the States as laboratories for devising solutions to difficult legal problems" and the "[d]eference to state lawmaking," such as that afforded by the *Parratt* rule, "allows local policies more sensitive to the diverse needs

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[3] Justice Kennedy also found that "Illinois provides a tort remedy for malicious prosecution" and that "[g]iven the state remedy and the holding of *Parratt*, there is neither need nor legitimacy to invoke § 1983 in this case." *Id.* at 285-86.

of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

And States have in fact developed their own responses to the complex legal problem of striking the proper balance between the competing interests at the heart of a malicious prosecution claim. While the elements generally do not differ substantially between them, States nonetheless have crafted their own rules in applying those elements. Thus, for instance, States have devised different rules for what constitutes a favorable termination to bring a malicious prosecution tort claim. Some States require a favorable termination on the merits of the prosecution to satisfy this element, *see, e.g.*, *Miller v. Desoto Reg'l Health Sys.*, 128 So. 3d 649 (La. App. Ct. 2013); *Ellsworth v. City of Gloversville*, 269 A.D.2d 654 (N.Y. App. Ct. 2000), while others find this element satisfied when the termination is indecisive as to the accused's guilt, *see, e.g.*, *Soon Phat L.P v. Alvarado*, 396 S.W.3d 78 (Tx. App. Ct. 2013).

Further, States differ in their treatment of a dismissal of a criminal case on grounds of double jeopardy. *Compare Haefner v. Burkey*, 626 A.2d 519 (Pa. 1993), *with Foshee v. S. Fin. & Thrift Corp.*, 967 S.W.2d 817 (Tn. App. Ct. 1997). And some States have

balanced the competing interests underlying the malicious prosecution tort in a manner that does away with the favorable termination requirement altogether, so that the claim accrues at an earlier date, *see Spencer v. Peters*, 2012 WL 4514417, at *7 (W.D. Wash. Oct. 2, 2012), or else consider favorable termination as part of the inquiry as to whether the prosecution was supported by probable cause, *see Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277 (N.M. 1997), *overruled on other grounds*, *Durham v. Guest*, 204 P.3d 19 (N.M. 2009).

These differences, though perhaps subtle, demonstrate that States tailor the specifics of their malicious prosecution torts to local practices and understandings as to how cases are criminally prosecuted in their jurisdiction. In this way, States are able to balance the interests underlying a malicious prosecution action, experiment with what works best for them, and tailor their solutions to accord with their particular needs. *Parratt* gives effect to these important interests. Petitioner's approach, on the other hand, would create a national one-size-fits-all cause of action.

But *Parratt* provides a constitutional backstop if the state law remedies are not adequate. *See* 451 U.S. at 543-44. This backstop provides meaningful protection to an individual's rights, as illustrated by the Seventh Circuit's decision in *Julian v. Hanna*, 732 F.3d 842 (7th Cir. 2013). There, Julian, an Indiana resident, brought a § 1983 lawsuit against, among others, three local Indiana police officers, the town that employed two

of the officers, and a county sheriff for malicious prosecution. *Id.* at 844. The Seventh Circuit examined whether Indiana provided an adequate state remedy for malicious prosecution and found that while Indiana recognized that tort, it had a statute that granted absolute immunity to the defendant state officers. *Id.* Although the court acknowledged "the state's interest in limiting officers' liability," *id.* at 848, it found that Indiana "deprives plaintiffs who assert due process claims against state officers of an adequate alternative remedy to a federal suit," *id.* at 846.

Julian illustrates that the concerns raised by the National Police Accountability Project (NPAP) in its *amicus* brief are unfounded. NPAP argues that States will contrive to undermine malicious prosecution tort claims by granting blanket immunity to officers (NPAP Br. at 10-13), placing caps on damages (*id.* at 16-19), and otherwise acting to prevent an individual from obtaining a remedy. But *Parratt* specifically accounts for this by measuring the adequacy of the state remedy.[4]

The *Parratt* principle comfortably fits the facts alleged here. According to Petitioner's amended complaint, the individual officers found pills on Petitioner's person and field tested them. JA64, 69. The officers then lied about the results of the field test.

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[4] NPAP also fails to account for the fact that, under any § 1983 malicious prosecution claim, law enforcement officers may be entitled to qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

JA69. Then, the pills were tested at the police station. JA70. And once again, the officers lied about the test results. JA71. These allegations show that the officers were likely following procedure by testing the pills both on the scene and then at the station. But by disregarding and lying about the test results, they engaged in the type of unauthorized conduct that is well within *Parratt*'s scope.

As discussed, *Mathews* instructs that in determining what process is due, the court is to consider the value and practicability of additional procedures. 424 U.S. at 335. *Parratt* applies in those cases where additional, predeprivation procedures are impossible because the acts of the officers are unauthorized and random. *See Zinermon*, 494 U.S. at 129-30. In *Hudson*, the *Parratt* rule applied to the officers' intentional conduct because, instead of acting pursuant to a state procedure, the officer was "pursuing a random, unauthorized personal vendetta." 468 U.S. at 533. Similarly, here, Petitioner specifically alleged that at least one of the officers was pursuing a vendetta against him. JA62-63. Moreover, postdeprivation process is afforded by Illinois's malicious prosecution tort claim. Under *Parratt*, therefore, petitioner's due process claim must fail.

II. Petitioner's Delayed-Accrual Rule Undermines The States' Interest In Timely Addressing Officer Misconduct.

The rule Petitioner seeks harms the States' interests in monitoring, responding to, and preventing officer misconduct. To avoid the statute of limitations, Petitioner urges this Court to adopt a rule that his new § 1983 cause of action accrued when the proceedings were terminated in his favor. Pet. 21, 25. This favorable termination, however, may occur many years after the initiation of the improper proceedings.

But permitting Petitioner to wait that long before raising a § 1983 claim hinders the States. In *Wallace*, this Court rejected the argument that equitable tolling could delay the accrual of a Fourth Amendment false arrest claim. 549 U.S. at 396-97. In doing so, the Court expressly spurned the contention that "law enforcement officers would prefer the possibility of a later § 1983 suit to the more likely reality of an immediate filing." *Id.* at 397. Rather, the Court pointed out that "no fewer than 11 States have informed us in this litigation" that States and municipalities "have a strong interest in timely notice of alleged misconduct by their agents." *Id.* After all, it is important for States and local governments to correct official abuses when they happen. The earlier they have notice of these abuses, the more effective these governments can be in addressing and correcting problems.

* * *

For these reasons, this Court should decline the invitation to create a Fourth Amendment malicious prosecution tort. Instead, the better fit for claims that legal processes have been abused is the Due Process Clause. This Court should apply the *Parratt* rule in these circumstances, and hold that so long as Illinois's malicious prosecution remedy is adequate, Petitioner may not bring a § 1983 action asserting such a claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Innocence Network (the Network) respectfully submits this brief as *amicus curiae* in support of Petitioner.

The Network is an association of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions. Established in 2005, the Network's sixty-nine member organizations represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as in Canada, New Zealand and the United Kingdom.[2] The Network and its

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[1] The parties have consented to the filing of this brief (Petitioner and Respondents filed blanket consent letters with the Court). Pursuant to Supreme Court Rule 37.6, counsel affirms that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member organizations include the Actual Innocence Clinic, After Innocence, Alaska Innocence Project, Arizona Innocence Project, Arizona Justice Project, The Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project/Post-conviction Unit, The Duke Center for Criminal Justice and Professional Responsibility, Exoneration Initiative, George C. Cochran Innocence Project, Georgia Innocence Project, Hawai`i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Project, Innocence Project Argentina, Innocence Project London, Innocence Project at UVA School of Law, Innocence Project New Orleans,

members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of

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Innocence Project New Zealand, Innocence Project Northwest, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, Justicia Reinvindicada, Kentucky Innocence Project, Knoops' Innocence Project (the Netherlands), Life After Innocence, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defender Office, Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Minnesota Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New Mexico Innocence and Justice Project at the University of New Mexico School of Law, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Reinvestigation Project, Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Taiwan Association for Innocence, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law (Canada), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Western Michigan University Cooley Law School Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic at Indiana University School of Law.

the criminal justice system and to ensure that future wrongful convictions are prevented.

Amicus has a unique perspective on the question presented in this case. The Network's member organizations have represented hundreds of clients who were wrongfully convicted, many due to pre-arrest misconduct on the part of law enforcement. In these cases, coerced confessions, intimidation of witnesses, use of suggestive photo arrays and lineups, and outright fabrication of forensic statistics caused innocent people to be seized without probable cause. As the stories of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders illustrate, the ordeals faced by many of those who have been wrongfully convicted often begins with a tainted determination of probable cause.

The Fourth Amendment is especially well-suited to ground § 1983 claims by exonerees seeking redress for the liberty deprivations they have suffered as a result of extended pre-trial detention on the basis of tainted determinations of probable cause. Malicious prosecution actions based on the Fourth Amendment allow exonerees to recover damages from the point of their initial detention without probable cause until the ultimate termination of the underlying criminal prosecution. Fourth Amendment malicious prosecution plaintiffs also benefit from a favorable statute of limitations, which accrues only upon the ultimate termination of the underlying prosecution in the plaintiff's favor. And unlike claims based only in the procedural due process protection of the Fourteenth Amendment, a Fourth Amendment malicious prosecution claim

provides the wrongfully convicted access to a federal Constitutional damages remedy even when a state remedy is available.

The availability of a Fourth Amendment remedy also ensures that state officials are aware of, and comply with, their Constitutional obligations. Should this Court confirm the existence of a malicious prosecution claim based on the Fourth Amendment, the litigation of such § 1983 actions would allow lower courts to further articulate the boundaries of permissible police conduct. In the long run, such precedents would discourage the use of law enforcement tactics that undermine the investigative and adversarial processes and contribute to wrongful convictions.

Given our clients' experiences, *amicus* strongly supports Petitioner's position that state and local officials who perpetrate seizures without probable cause violate the Fourth Amendment and may be held personally liable under 42 U.S.C. § 1983, and offers the narratives of five exonerees to illustrate the human dimension of the question before the Court.

SUMMARY OF ARGUMENT

This case squarely raises the question whether a malicious prosecution action based on the Fourth Amendment is cognizable under § 1983. The vast majority of the United States Courts of Appeals have so concluded. The lone holdout is the Seventh Circuit, which maintains that federal claims of malicious prosecution are founded on the right of

due process only, and are therefore available only when a state remedy is not.

The effects of such a restrictive rule are borne by the many clients of the Network's member organizations who have been convicted of crimes they did not commit. The ordeal of many of these exonerees began with a detention based on a tainted determination of probable cause. However, under the Seventh Circuit's approach, no person who has been wrongfully detained on less than probable cause as a result of police misconduct may obtain a Fourth Amendment malicious prosecution remedy using § 1983, except in the circumstance where a state tort remedy is not available.

In other words, if City of Joliet police officers had fabricated the evidence, tainted the identifications, and coerced the confessions that contributed to the wrongful convictions of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, Michael Saunders—and the countless others like them—the Seventh Circuit would shield the officers' conduct from any liability in a § 1983 malicious prosecution suit based on the Fourth Amendment.

In view of the devastating effects that follow from such police misconduct, *amicus* urges the Court to confirm the availability of a Fourth Amendment remedy for victims of malicious prosecution.

ARGUMENT

I. A FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM IS A VIABLE CONSTITUTIONAL TORT COGNIZABLE UNDER § 1983

A. This Court's Precedent Establishes that Malicious Prosecution is Actionable as a Fourth Amendment § 1983 Claim

For over forty years, this Court has held that the Fourth Amendment protection against unfounded invasions of liberty and privacy requires a judicial determination of probable cause for any extended detention related to potential or actual criminal charges. *Gerstein v. Pugh*, 420 U.S. 103, 112-14 (1975). The Court long ago determined that the existence of probable cause should be decided by a neutral and detached magistrate, and not by law enforcement officials engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). While the Court has expressed a preference for a determination of probable cause prior to arrest through the use of arrest warrants, law enforcement officials may also seek to persuade a magistrate within fourty-eight hours of an arrest that probable cause supports continued detention. *Gerstein v. Pugh*, 420 U.S. 113-14; *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Wong Sun v. United States*, 371 U.S. 471, 479-482 (1963).

Where an individual is detained pursuant to an arrest warrant obtained as a result of police misconduct, the detention violates the Fourth Amendment and the officers who obtained that warrant can be held liable under 42 U.S.C. § 1983. *See Malley v. Briggs*, 475 U.S. 335 (1986). Likewise, five Justices of the Court confirmed in *Albright v. Oliver*, 510 U.S. 266 (1994), that the Fourth Amendment continues to apply when a person is wrongfully detained following a post-arrest determination of probable cause tainted by misleading officer testimony. *Id.* at 274-75 (plurality opinion); *id.* at 286 (Souter J., concurring in judgment).

B. Nine Courts of Appeals Have Recognized Federal Malicious Prosecution Claims under the Fourth Amendment

The vast majority of the United States Courts of Appeals have concluded that a malicious prosecution action based on the Fourth Amendment is cognizable under § 1983. *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 94, 105 (1st Cir. 2013) ("an individual's Fourth Amendment right to be free from seizure but upon probable cause continues through the pretrial period, and that, in certain circumstances, injured parties can vindicate that right through a § 1983" action); *Manganiello v. City of New York*, 612 F.3d 149, 160-161 (2d Cir. 2010) (holding that "In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and must establish the

elements of a malicious prosecution claim under state law ") (citations omitted); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3rd Cir. 2009) (holding that a Fourth Amendment § 1983 malicious prosecution claim lies where the plaintiff can show, among others, that she "suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding"); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("A 'malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort.'"); *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) ("The Sixth Circuit 'recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment,' which 'encompasses wrongful investigation, prosecution, conviction, and incarceration.'"); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th. Cir. 2004) ("[W]e have held, post-*Albright*, that a § 1983 malicious prosecution plaintiff must prove that the defendants acted for the purpose of depriving him of a 'specific constitutional right,' but have not limited that right to one protected by the Fourth Amendment.") (citation omitted); *Becker v. Kroll*, 494 F.3d 904 914 (10th Cir. 2007) ("We have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.'"); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) ("This Circuit 'has identified malicious prosecution as a violation of the Fourth Amendment and a viable constitutional tort

cognizable under § 1983.'"); *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007) ("We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably "seized" without probable cause, in violation of the Fourth Amendment.").

These Courts of Appeals have correctly recognized that the range of police misconduct that can undermine the neutral determination of probable cause should be actionable in a Fourth Amendment malicious prosecution claim. The courts have identified the following police misconduct as subject to liability:

- the use of a witness whom an officer knows to be untruthful to procure an indictment (*Manganiello v. City of New York*, 612 F.3d at 160-163)
- the inclusion by police of a false identification resulting from a tainted photo array in a warrant affidavit (*Hernandez-Cuevas v. Taylor*, 723 F.3d at 105);
- lying to or misleading the prosecutor, failing to disclose exculpatory evidence to the prosecutor, or unduly pressuring the prosecutor to seek an indictment (*Evans v. Chalmers*, 703 F.3d at 647-648);
- making false or misleading statements and omitting material information from

a warrant application (*Sykes v. Anderson*, 625 F.3d at 306-308);

- coercing false statements (*Wilkins v. DeReyes*, 528 F.3d 790, 802 (10th Cir. 2008));
- fabricating evidence (*Grider v. City of Auburn*, 618 F.3d at 1258); and
- initiating criminal proceedings causing the detention of a person despite the absence of eyewitness identifications or other reliable evidence (*Pitt v. District of Columbia*, 491 F.3d at 511).

The Fifth and Eighth Circuits have not yet conclusively extended Fourth Amendment relief to the maliciously prosecuted. *See e.g. Castellano v. Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003) ("[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983."); *Harrington v. City of Council Bluffs*, 678 F.3d 676, 680-81 (8th Cir. 2012) ("Assuming a Fourth Amendment right against malicious prosecution exists, such a right was not clearly established when the appellees were prosecuted in 1977 and 1978.").

Nevertheless, neither the Fifth nor the Eighth Circuit has adopted the restrictive approach currently favored by the Seventh Circuit. After this

Court's decision in *Albright*, the Seventh Circuit initially accepted that an individual subjected to extended detention on less than probable cause could pursue a § 1983 malicious prosecution claim founded on the Fourth Amendment. *See Smart v. Bd. Of Trs. Of Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994). Six years later, however, the Seventh Circuit reversed itself, adopting an interpretation of *Albright* that limits the constitutional protection from prosecution without probable cause to the purview of due process. *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). Accordingly, the Seventh Circuit now maintains that no malicious prosecution claim exists under the federal Constitution unless no state law remedy is available.

It was on this basis that the court below affirmed the District Court's dismissal of Petitioner's § 1983 complaint against the City of Joliet and several of its police officers. *Manuel v. City of Joliet*, 590 F. 641, 642 (7th Cir. 2015).

II. THE CURRENT SEVENTH CIRCUIT APPROACH UNDULY RESTRICTS THE AVAILABILITY OF FOURTH AMENDMENT RELIEF

A. A Fourth Amendment § 1983 Malicious Prosecution Cause of Action is An Important Remedy for the Wrongfully Convicted

Courts have long recognized the "medley of harms" inflicted by subjecting individuals to baseless prosecution. *Albright v. Oliver*, 975 F.2d 343, at 345

(7th Cir. 1992), *aff'd* 510 U.S. 1215 (1994). When police obtain a search warrant or a determination of probable cause after a warrantless arrest on the basis of fabricated or coerced evidence, the targeted individual suffers a range of liberty deprivations that engage Fourth Amendment protection. First and foremost are the effects of being "thrown into jail to await trial." *Albright v. Oliver*, 975 F.2d at 346. The devastating effect of incarceration on the person who is seized as well as on his or her family and community is well-documented. *See e.g.* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 Harv. C.R.-C.L. L. Rev. 257, 262 (2013) (noting that the formerly incarcerated suffer psychological trauma "in some ways similar to repatriated prisoners of war"); Thomas F. Geraghty, *Prisons and after Prison*, 94 J. Crim. L. & Criminology 1149, 1159 (2004) (reviewing John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003), *et al.*) ("If the devastating impact of imprisonment on prisoners, as it is practiced in the United States, is not enough, existing practices regarding prisoner contact with the outside world ensure that the tragedy of incarceration will have ripple effects on families and on communities."); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1552-53 (2003) (noting that incarceration "can adversely affect the ability of returning prisoners to re-enter labor markets," "often disrupts family ties and social networks," "potentially stigmatizes neighborhoods, complicating the ability of residents to...compete in labor markets," and "may transform into an intrinsic

part of the ecological dynamics of neighborhoods that may actually elevate crime within neighborhoods").

Racial minorities, the poor, and the uneducated disproportionately suffer the effects of incarceration. Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 Annals Am. Acad. Pol. & Soc. Sci. 221, 231 (2009) ("For black male dropouts born since the mid-1960s, 60 to 70 percent go to prison," which "has become a routine life event on the pathway through adulthood."); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. Davis L. Rev. 1005, 1009 (2001) (explaining that "[h]igh incarceration rates among Black adults (and an increasing number of juvenile offenders) and detention rates among Black children" disproportionately disrupt black families, including through "the disproportionate removal of Black children from their parents' custody to state control"); John Tierny, *Prison and the Poverty Trap*, N.Y Times, Feb. 18, 2013, http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html (noting that "[a]mong African-Americans who have grown up during the era of mass incarceration, one in four has had a parent locked up" and "[f]or black men in their 20s and early 30s without a high school diploma, the incarceration rate is so high – nearly 40 percent nationwide – that they're more likely to be behind bars than to have a job").

Individuals detained on less than probable cause but released before trial also face deprivations that warrant Fourth Amendment protection. A person facing baseless criminal charges is "required

to appear in court at the state's command," is often subject "to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction," "may suffer reputational harm," and "will experience the financial and emotional strain of preparing a defense." *Albright v. Oliver*, 510 U.S. at 278 (Ginsburg J. concurring). As Justice Ginsburg and others have concluded, a defendant released pretrial remains "effectively 'seized' for trial so long as the prosecution against him remain[s] pending." *Id.* at 279-80; *Murphy v. Lynn*, 118 F.3d 938, 945 (2nd Cir. 1997) (holding that plaintiff was seized under the Fourth Amendment when ordered not to leave the state and required to attend court); *Gallo v. City of Philadelphia*, 161 F.3d 217, 223-25 (3d Cir. 1998) (holding that plaintiff was seized when subjected to travel restrictions and required to contact pretrial services weekly); *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (holding that a summons coupled with a bond and travel restrictions may constitute a seizure).

A determination of probable cause tainted by police misconduct also has ripple effects. The wrongfully arrested and charged—many of whom are poor, uneducated, or otherwise vulnerable to coercive state conduct—face an unfair choice: fight a case whose adjudication has been corrupted by malicious law enforcement tactics, or seek to escape seizure by agreeing to a favorable plea. In this context, it is worth recalling that only approximately five percent of all state felony criminal prosecutions go to trial, and that plea bargains account for nearly

ninety-five percent of all criminal convictions. *Padilla v. Kentucky*, 559 U.S. 356, 372 n.13 (2010) (citing Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2003*, p. 418 (31st ed. 2005). Police misconduct that corrupts the initial seizure might also undermine the investigative and adjudicative processes that follow. For example, the suppression of exculpatory evidence by police may be the first in a chain of events that "effectively short-circuit[s] the adversarial process" altogether. Sean O'Brien, *Presumed Guilty: Innocence and the Death Penalty*, 2007 J. Inst. Just. Int'l Stud. 14, 18. Indeed, in the Network's experience, wrongful convictions are often the result of multiple factors. *See e.g.* Mid-Atlantic Innocence Project profile of Kirk Bloodsworth, http://www.exonerate.org/other-local-victories/kirk-bloodsworth/ (last visited May 4, 2016).

The ordeals faced by the many clients of the Network's member organizations who were wrongfully convicted often began with a tainted determination of probable cause. As explained below, police misconduct denied each of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders a neutral determination of probable cause. In these cases, pre-arrest police tactics—coerced confessions, intimidation of witnesses, use of suggestive photo arrays and lineups, and outright fabrication of forensic statistics—caused innocent people to be unlawfully seized and detained. Each was eventually convicted of crimes they never committed, and together, Gray, Rose, Anderson, Bromgard, and

Saunders together served *seventy-nine years* in prison.

B. Paula Gray[3]

In 1978, Paula Gray was wrongfully convicted of murder, rape, and perjury. Police officers had forced her to confess to the crimes by threatening her with imprisonment, rape, and death, and through other forms of intimidation and physical force. Ms. Gray was not yet an adult at the time and had the mental capacity of a much younger child. Ms. Gray's coerced confession was used to charge her and four other men. She served 24 years in prison as a result. Ms. Gray's conviction was eventually thrown out after the police officers' actions came to light.

Paula Gray grew up in Chicago Heights with her mother, four sisters, and two brothers. At the age of 6, her IQ was measured at 57, classifying her as "mentally retarded." *People v. Jimerson*, 166 Ill. 2d 211, 218 (1995). In the spring of 1978, when Ms. Gray was 17, she was unable to read, write, or tell time. *Id.* at 219.

On Friday, May 12 1978, plainclothes police officers came to Ms. Gray's home and took her "to the police station or Sherrif's jail." Unbeknownst to Ms. Gray, a young man and woman had been

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[3] Unless otherwise noted, the facts of Ms. Gray's case are taken from the Opinion of Circuit Court Judge William D. O'Neal, July, 2001 (vacating conviction), unreported but available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/paula-gray.html. That opinion is over 300 pages long and is not paginated.

abducted from a gas station: the woman had been raped, and the couple then murdered.

The police asked Ms. Gray what she knew about the crimes. She responded that she didn't know anything. The police accused her of lying. They called her a "bitch[]," "slut[]," and "whore[]." One officer grabbed her wrist, kept squeezing it and wouldn't let it go, even though she told him he was hurting her. Another flicked his finger on her head.

The officers wanted Ms. Gray to implicate herself. They told her to say that she held a lighter while four men took turns raping the woman, and then killed the woman and the young man she was with. Officers told Ms. Gray she would go to prison for life if she did not adopt the story they had fabricated. The police also told her that she "would never see her family again," and that "what happened to the woman," meaning the female victim who was raped and murdered, "would happen to her."

Later the next day, officers took Ms. Gray to an abandoned building where the young couple had been murdered. Officers walked her through the crime scene, explaining the version of events they wanted her to adopt as her own. Ms. Gray would later testify that she thought the police were going to kill her. At no point did the police recite Ms. Gray her *Miranda* rights, nor did she waive them.

Soon thereafter, Ms. Gray testified before a grand jury, retelling the story that the police had instructed her to tell.

Approximately a month later, Ms. Gray testified at a preliminary hearing, at which time she

recanted her statement to the grand jury and denied all knowledge of the crimes. *People v. Jimerson*, 166 Ill. 2d at 213. Upon her recantation, Ms. Gray was charged for the rape and murders along with perjury. She was incarcerated upon being charged. While in a detention facility during her trial, Ms. Gray was watched by a Sheriff's policeman who gave her no privacy despite her repeated requests, and who on one occasion unlocked her cell, came in, and kissed her. When she returned to the County Jail, Ms. Gray was raped in her cell by four inmates after returning from showering.[4]

Ms. Gray was convicted of murder, rape, and perjury, and sentenced to concurrent terms of fifty years' imprisonment for each murder, fifty years for rape, and ten years for perjury.

Three other men ultimately confessed to the crimes, and their guilt was later confirmed by DNA testing. The officers' coercion of Paula Gray's false confession was discovered during a later civil rights suit. Ms. Gray's conviction was eventually thrown out in 2001.

All told, Ms. Gray spent twenty-four years in jail as a result of state misconduct, and it would be about thirty-four years before she was granted a pardon based on her innocence.

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[4] It is unclear from Circuit Court Judge O'Neal's opinion when, precisely, Paula Gray was raped.

C. Peter Rose[5]

In 1995, Peter Rose was wrongfully convicted of rape, kidnapping, and forced oral copulation. Police pressured a young girl to identify Mr. Rose as the man who had attacked her, despite the fact that she could not identify Mr. Rose in a photo lineup. Mr. Rose was arrested, charged, and convicted. He would serve ten years in prison before being exonerated on the basis of DNA evidence.

On November 29, 1994, a thirteen-year-old girl was attacked while walking to school in California. She said a man had punched her in the face and dragged her into an alley where he raped her from behind. After the man fled, the girl flagged down a passing car and told the driver she had been raped and asked for a ride home. As they drove off, the girl pointed at a man walking on the street and said, "There he is!"

Police prepared a photographic lineup containing a photo of Mr. Rose and showed it to the victim and the driver of the car. Neither picked out Mr. Rose.

Over the next three weeks, no suspect was charged. It was then that police started to pressure the victim to identify Mr. Rose. Two detectives brought the young girl to a small room in the basement of the police station. In an interview that

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[5] Unless otherwise indicated, the facts of Mr. Rose's story are taken from Susan Rutberg, *Anatomy of a Miscarriage of Justice: The Wrongful Conviction of Peter J. Rose*, 37 Golden Gate U. L. Rev. 7 (2006).

would last over three hours, the victim insisted she did not know who attacked her. The two detectives, both men, repeatedly accused the victim of lying. They quizzed her about her story over and over in an effort to find inconsistencies. The police proceeded to scorn the victim's belief in God, asked her to swear on her grandfather's life, asked her demeaning questions about her body, accused the young victim of prostitution and gang affiliation, and threatened to tell her grandfather that she had been sexually active, all while calling her a liar. Only then did the victim hesitantly mention Mr. Rose.[6]

At the end of the interview, the detectives again showed the victim a photo spread that included Mr. Rose's picture. This time she selected his photo. Mr. Rose was arrested the next day.

Despite having repeatedly told police that she could not identify her attacker—and her refusal to pick Mr. Rose out of the first photo lineup—the victim became certain of her identification of Mr. Rose by the time she testified at the preliminary hearing several weeks later. She would repeat that she was certain of her identification of Mr. Rose again at trial.

Mr. Rose was eventually convicted and sentenced to twenty-seven years in prison. He was exonerated ten years later on the basis of a DNA test that excluded him as the rapist.

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[6] Rutberg at 11-12 (citing Transcript of Police Interview with Victim at 37-38, *People v. Rose*, L.P.D. 94-14431 (Cal. Dec. 20, 1994)) (emphasis removed).

D. Marvin Anderson[7]

Marvin Anderson was convicted in 1982 of a rape he did not commit and sentenced to 210 years in prison. He was singled out as a suspect because he was the only black man in the community in rural Virginia that the police knew to have a white girlfriend. Mr. Anderson was then the subject of a suggestive photo array and a suggestive lineup, after which the victim identified him as her attacker. He was convicted entirely on the basis of this identification. After fifteen years in prison and four years on parole, Mr. Anderson was eventually exonerated after DNA testing excluded him as the perpetrator.

On July 17, 1982, a young woman was raped by a black man who was a total stranger to her. The victim told police that her assailant said he "had a white girl." Marvin Anderson, then an eighteen-year-old with no criminal record, was the only black man the investigating officer knew who lived with a white woman. Because of this fact, the police zeroed in on Mr. Anderson.

Mr. Anderson had no criminal record, so the officer went to Mr. Anderson's employer to obtain a picture of him. Mr. Anderson's employment photo-identification card included a color photo. The

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[7] Unless otherwise indicated, the facts of Mr. Anderson's story are taken from Francis X. Clines, *DNA Clears Virginia Man of 1982 Assault*, N.Y. Times, Dec. 10, 2001, http://www.nytimes.com/2001/12/10/national/10DNA.html and the Mid-Atlantic Innocence Project profile of Marvin Anderson, http://www.exonerate.org/maip-victories/marvin-anderson (last visited May 3, 2016).

victim was presented with a photo lineup of standard black-and-white police photographs of criminals, except for the color employment identification photograph of Mr. Anderson. The victim identified Mr. Anderson as her assailant.

Within an hour of the photo lineup, the victim was asked to identify her assailant from at an actual lineup. Mr. Anderson was the only person in the lineup whose picture had been in the original photo array shown to the victim. The victim identified him in the lineup as well, despite the fact that Mr. Anderson differed from significantly from the victim's initial description of her attacker. Several alibi witnesses also placed Mr. Anderson at home at the time of the crime.

At trial, prosecutors relied entirely on the victim's identification of Mr. Anderson. He was convicted by an all-white jury and sentenced to 210 years in prison.

Mr. Anderson spent fifteen years in prison and four years on parole before DNA testing excluded him as the perpetrator.

E. Jimmy Ray Bromgard[8]

In late 1987, Jimmy Ray Bromgard was convicted of a sexual assault he did not commit and was sentenced to forty years to life in prison. Mr. Bromgard was arrested after the state crime laboratory matched his hairs to samples found at the

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[8] Unless otherwise indicated, the facts of Mr. Rose's story are taken from *State v. Bromgard*, 261 Mont. 291, 292-93 (Sup. Ct. Mont. 1993).

crime scene on the basis of junk science. The forensic scientist who declared the match was fabricating frequencies and probabilities. Mr. Bromgard served fifteen years in prison before he was eventually exonerated by DNA testing.

In the early morning hours of March 20, 1987, an intruder raped an eight-year-old girl. Based on the victim's description, the police created a composite sketch of the assailant. Seeing the sketch, another officer mentioned that he thought it looked like eighteen-year-old Jimmy Ray Bromgard. A neighbor who saw the sketch said the same.

Mr. Bromgard agreed to submit head and pubic hair samples. The State Crime Laboratory found Mr. Bromgard's hairs to be "indistinguishable from certain samples recovered from the victim's bedding." *State v. Bromgard*, 261 Mont. at 293. Mr. Bromgard was arrested, charged, and tried on three counts of sexual intercourse without consent.

Arnold Melnikoff, the forensic scientist who had reported that Mr. Bromgard's hairs tied him to the crime scene, testified that head and pubic hairs found at the scene of the rape were indistinguishable from those of Mr. Bromgard. Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. Times. Dec. 19, 2002, http://www.nytimes.com/2002/12/19/us/2-states-to-review-lab-work-of-expert-who-erred-on-id.html. Melnikoff further testified that the probability that either set of hairs found at the scene of the crime were not those of Mr. Bromgard were "1 in 100." *Id.* Because head and public hairs look different, he testified, "it's a multiplying effect, it would be 1

chance in 10,000." *Id.* A jury found Mr. Bromgard guilty of all three counts.

Little other evidence beyond Melnikoff's testimony was presented at Mr. Bromgard's trial. Indeed, in a television interview years later, the prosecutor in Mr. Bromgard's case stated that "without Melnikoff's hair report and testimony about the numbers, [he] would not have even filed an information charging Mr. Bromgard with the crimes." Transcript of Deposition of Mike McGrath, at 234:5-10, *Bromgard* v. *State*, CV-05-32-BLG-RWA (D. Mont. Sept. 29, 2006), http://netk.net.au/Montana/McGrathDeposition.pdf (last visited May 5, 2016).

The problem with the hair analysis used as the basis to charge Mr. Bromgard is that "no adequate empirical data exist regarding the frequency of microscopic characteristics of human hairs." Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 19 (2009). In other words, when Melnikoff testified that there was a "1 in 10,000" chance that the hairs from the crime scene could have come from someone other than Mr. Bromgard, "those frequency statistics were simply made up by the analyst." *Id.* As one peer review report of Mr. Bromgard's case said, "there is not—and never was—a well established probability theory for hair comparison." Richard E. Bisbing et al., *Peer Review Report: Montana v. Jimmy Ray Bromgard*, at 2, http://www.law.virginia.edu/pdf/faculty/garrett/innocence/peer_review_report.pdf.

It was later discovered that Melnikoff's fabricated frequencies and probabilities were used to wrongfully charge and convict at least three other innocent men. Melnikoff was the director of Montana's State Crime Laboratory for almost two decades, and worked as a forensic scientist for the Washington State Police for over a decade. Liptak, *supra*.

Mr. Bromgard served fifteen years in prison before he was exonerated by DNA testing.

F. Michael Saunders[9]

In 1997, Michael Saunders was sentenced to forty years in prison for a rape and murder he did not commit. Police coerced false confessions from a number of young men by threatening violence and feeding them the supposed details of the crime. Eventually, Mr. Saunders was named. The police used physical violence to coerce Mr. Saunders into signing a pre-drafted confession. Mr. Saunders would serve 15 years in prison before he was exonerated by DNA testing.

On November 7, 1994, the body of Nina Glover was found in the Englewood neighborhood of Chicago's south side. She had been raped and murdered.

With the investigation going nowhere, officers arrested an eighteen-year-old by the name of Jerry

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[9] Unless otherwise indicated, the facts of Mr. Saunders' story are taken from *Saunders v. City of Chicago*, 2015 WL 4765424 (N.D. Ill. Aug. 12, 2015).

Fincher. Police threatened Fincher with violence and fed him details of the crime. Over the course of two days, Fincher gave an evolving series of statements. The officers eventually coerced Fincher into giving a false statement to the Assistant State's Attorney (ASA), who participated in the interrogation. Fincher's coerced statement falsely implicated himself and four other teenagers from the neighborhood, including Michael Saunders.

The police then arrested sixteen-year-old Harold Richardson as well as Terrill Swift. Swift was coerced into confessing and falsely implicating Richardson and Mr. Saunders. After hours of "improper coercion and false promises of leniency," the officers also coerced a false confession from Richardson, which implicated Thames and Mr. Saunders. *Saunders v City of Chicago*, at *2.

Finally, the police arrested and interrogated Mr. Saunders, who was then fifteen years old. The officers never advised Mr. Saunders of his rights, and refused to act on his requests for a lawyer and to call his mother. Officers used physical violence and threats to try to coerce Mr. Saunders into giving a false confession. Another ASA fabricated a written statement that was attributed to Mr. Saunders implicating himself and the other teenagers in the rape and murder. Under pressure, Mr. Saunders signed this statement without reading it and initialed "corrections" within the document that police and prosecutors falsely attributed to Mr. Saunders. *Id.*

Mr. Saunders was convicted after a bench trial in 1997. The presiding judge said that the

whole case against Mr. Saunders came down to his confession, and that without it, there was no case. *Id.* at 5. Mr. Saunders was sentenced to forty years in prison.

Fourteen years later, in 2011, DNA testing returned a match to another man. Mr. Saunders' conviction was vacated, and he was granted a Certificate of Innocence in 2012 over the State's Attorney's objections.

III. THE COURT SHOULD PROVIDE VICTIMS OF MALICIOUS PROSECUTION A FOURTH AMENDMENT REMEDY

The Fourth Amendment is especially well-suited to ground § 1983 claims by exonerees seeking redress for extended pre-trial detention on the basis of determinations of probable cause tainted by police misconduct. As the plurality opinion in *Albright* noted, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it....We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Albright v. Oliver*, 510 U.S. at 274 (citing *Gerstein v. Pugh*, 420 U.S. at 114). The availability of a Fourth Amendment remedy therefore ensures that law enforcement officials are aware of, and comply with, their Constitutional obligations. As one scholar of criminal procedure has noted, "[t]he central issue in modern Fourth Amendment doctrine is the degree to which it is possible and/or desirable to constrain discretionary police authority by a regime of rules." Thomas Y.

Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 747 (1999). Should this Court confirm the existence of a malicious prosecution claim based on the Fourth Amendment, the litigation of such § 1983 actions would allow lower courts to further articulate the boundaries of permissible police conduct. In the long run, such precedents would help disincentivize the use of law enforcement tactics that contribute to wrongful convictions.

Malicious prosecution actions based on the Fourth Amendment offer redress to such exonerees that other § 1983 actions do not, including the availability of damages from the point a person has been initially detained without probable cause until the ultimate termination of the underlying criminal prosecution. John R. Williams, *Beyond Police Misconduct and False Arrest: Expanding the Scope of 42 U.S.C. § 1983 Litigation*, 8 Suffolk J. Trial & App. Adv. 39, 42-43 (2003); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Fourth Amendment malicious prosecution plaintiffs also benefit from a more favorable statute of limitations—whereas other constitutional claims, including claims for false arrest, accrue from the date of the initial arrest, a malicious prosecution action accrues only upon the ultimate termination of the underlying prosecution in the plaintiff's favor. *Albright v. Oliver*, 510 U.S. at 280 (Ginsburg J.); see also *Albright v. Oliver*, 975 F.2d at 345. And an approach that restricts federal malicious prosecution claims to the procedural due process protection of the Fourteenth Amendment—such as that applied by the Seventh Circuit below—risks denying the wrongfully convicted access to a

federal Constitutional damages remedy except in the very few instances where a state refuses one. *See e.g. Newsome v. McCabe*, 256 F. 3d at 750-51; *Pierce v. Gilchrist*, 359 F.3d 1279, 1288 (10th Cir. 2004); Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation*, Federal Judicial Center, at 35 (2d ed. 2008).

If the Seventh Circuit's approach is adopted by this Court, no person who has been wrongfully detained on less than probable cause as a result of police misconduct could obtain a Fourth Amendment malicious prosecution remedy, except in the circumstance where no state tort remedy is available. More concretely, if City of Joliet police officers had fabricated the evidence, tainted the identifications, and coerced the confessions that contributed to the wrongful convictions of Paula Gray, Peter Rose, Marvin Anderson, Jimmy Ray Bromgard, and Michael Saunders, the Seventh Circuit would shield the officers' conduct from any liability in a § 1983 Fourth Amendment malicious prosecution suit.

Those incarcerated as a result of police misconduct that undermines the neutral determination of probable cause suffer extensive harm. The mere fact of incarceration subjects the wrongfully prosecuted and their families to unnecessary psychological, economic, and social injury. Racial minorities, the poor, and the uneducated disproportionately suffer these effects. Individuals detained on less than probable cause but released before trial also face liberty restrictions, including the restricted ability to travel as well as

the prospect of emotional, financial, and reputational ruin.

In view of its extensive experience representing the wrongfully convicted, the Network respectfully submits that those who have been denied a neutral determination of probable cause by police misconduct should have access to a Fourth Amendment malicious prosecution remedy.

CONCLUSION

For the foregoing reasons, and those presented by Petitioner, the judgment should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF SHELDON H. NAHMOD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF SHELDON H. NAHMOD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Sheldon H. Nahmod is Distinguished Professor of Law at IIT Chicago-Kent College of Law.[1] His principal field of study and teaching is the interrelationship of 42 U.S.C. § 1983 and constitutional law. In 1979, he wrote the first treatise devoted exclusively to § 1983, which is now a three-volume work in its fourth edition. In addition, he has written many articles addressing the proper interpretation and application of § 1983. He has lectured on § 1983 to federal judges under the auspices of the Federal Judicial Center. He has also consulted with numerous plaintiffs' and defendants' attorneys on § 1983 issues. Further, he has argued § 1983 cases before this Court and the Courts of Appeals for the First, Seventh, Eighth, and Tenth Circuits. See, *e.g.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983). And this Court has cited his publications in § 1983 decisions. See, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 255 n.9 (1978).

Professor Nahmod's professional dedication to the proper understanding of § 1983 makes him particularly interested in the Court's decision in this case. He takes no position on the Fourth Amendment issue posed in the Question Presented. However, he wishes to impress upon the Court his conviction that the ultimate outcome in this case must be firmly

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

grounded on § 1983, rather than the common law of malicious prosecution, so that all persons have effective access to this vital tool for protecting their constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over twenty years ago, this Court acknowledged "an embarrassing diversity of judicial opinion" on "the extent to which a claim of malicious prosecution is actionable under § 1983." *Albright* v. *Oliver*, 510 U.S. 266, 270 n.4 (1994) (plurality opinion). This embarrassment continues, seriously impeding the vindication of the Fourteenth Amendment and other constitutional rights. The time has come to answer the fundamental issues raised by the Question Presented, which as the certiorari petition recognized (at 10-11, 21, 25-26) necessarily include whether the elements of the common law malicious prosecution tort—and the favorable termination element in particular—apply to Petitioner's § 1983 claim.

The only defensible answer to that crucial statutory interpretation question is that the common law elements of malicious prosecution should play no independent role in determining the scope of claims under 42 U.S.C. § 1983. Section 1983 created a federal statutory remedy for constitutional violations perpetrated by state actors, whereas malicious prosecution is a common law tort. To describe a § 1983 claim as "malicious prosecution" is a misnomer that directs attention away from the real inquiry—the elements of the constitutional provision underlying the particular § 1983 claim—and improperly focuses instead on the elements of the malicious prosecution tort. In this respect the Seventh Circuit gets it right while other circuits do not: "[I]f a plaintiff can estab-

lish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'" *Newsome* v *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

Attempts to analogize between so-called § 1983 "malicious prosecution" claims and the common law elements of malicious prosecution have caused a great deal of confusion in the lower courts. The *en banc* Fifth Circuit described its own "precedent governing § 1983 malicious prosecution claims" as "a mix of misstatements and omissions" that has led to "inconsistencies and difficulties." *Castellano* v. *Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (*en banc*). And the Fifth Circuit acknowledged that it is "not alone in this drift. Other circuits have traveled uneven paths as well, and numerous approaches have developed after *Albright*." *Ibid.*; see generally Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* §§ 3:66-3:67 (4th ed. 2015) (collecting and analyzing post-*Albright* cases in the circuits, and arguing that malicious prosecution law should not dictate scope of § 1983).

Petitioner tries to take advantage of this confusion to save his § 1983 "malicious prosecution" claim from dismissal on statute of limitations grounds. He maintains that § 1983 imports the "favorable termination" element of common law malicious prosecution, which would have prevented accrual of his claim until he was released and the charges against him dropped. Such a maneuver cannot be squared with § 1983 or this Court's precedents.

1. Contrary to the rule that Petitioner needs to prevail, the elements of common law torts like malicious prosecution do not dictate the elements of a

§ 1983 claim. Nothing in the text of § 1983, its legislative history, or its purposes indicates that Congress intended to merely duplicate common law torts. Section 1983 by its own language was enacted to enforce the "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Regardless of any superficial similarity between particular § 1983 actions and particular tort actions, the vital constitutional interests served by § 1983 are distinct from and independent of the principles that animate tort law.

The Court has consistently reaffirmed that constitutional deprivations are central to § 1983 claims. Thus, the statutory cause of action may be interpreted against the "background of tort liability," but only to implement § 1983, not to define its scope. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). At most, common law principles can fill gaps as necessary to effectuate a damages remedy for constitutional violations.

2. Importing the common law elements of malicious prosecution into § 1983 would be particularly ill-advised. The last two decades have demonstrated that attempts to do so result only in confusion. Indeed, the fundamental disconnect between the elements of a § 1983 claim and the elements of a common law malicious prosecution claim virtually guarantees confusion. In addition, the entire enterprise of attempting to interpret a supposedly uniform federal cause of action based on tort law that varies not only from one state to another, but from the time of § 1983's enactment in 1871 to the present day, is just not workable.

Finally, as a matter of § 1983 law and policy, there is no good reason to make any of the traditional elements of malicious prosecution into elements of Petitioner's § 1983 claim for unlawful pretrial detention. Several of the malicious prosecution elements (including the favorable termination requirement) contradict established § 1983 precedents. And others (such as the absence of probable cause) make sense only to the extent that the underlying constitutional right requires their consideration. In short, this Court's interpretation of § 1983 should not be governed by the common law tort of malicious prosecution.

ARGUMENT

I. SECTION 1983 DOES NOT FEDERALIZE STATE TORT LAW.

A. The Text, History, And Purposes Of § 1983 Demonstrate That Congress Did Not Intend To Duplicate Common Law Causes Of Action.

Section 1983 is a federal civil cause of action for the enforcement of rights granted by the Constitution and federal law. Nothing in its straightforward text, legislative history, or purposes indicates that it federalizes common law torts such as malicious prosecution.

1. The text of § 1983 does not mention state tort law: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . " 42 U.S.C. § 1983.

This language identifies a proper plaintiff and requires injury to the plaintiff. It also specifies that the defendant be a "person" who, while acting under color of state law, causes the plaintiff to be deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. But nothing in § 1983's text directs courts to reflexively import state tort law. To the contrary, the statute tells courts to look to the Constitution and other federal law in defining the cause of action.

2. The legislative history of the provision enacting what is now § 1983—§ 1 of the Civil Rights Act of 1871—confirms that Congress had no intention of duplicating existing common law causes of action in § 1983. See 17 Stat. 13. "The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 934 (1982)—linking the cause of action to the Constitution, not the common law. See also *Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 683-686 & n.45 (1978) (recounting history "corroborat[ing] that Congress intended to give a broad remedy for violations of federally protected civil rights").

Proponents of § 1 of the Act consistently emphasized its relationship to the Constitution. One Senator described § 1 as a statute that "reënact[s] the Constitution." Cong. Globe, 42d Cong., 1st Sess. 569 (1871) (Sen. Edmunds). And the author of § 1 of the Fourteenth Amendment stated that the purpose of

§ 1983 is "the enforcement . . of the Constitution on behalf of every individual citizen of the Republic to the extent of the rights guarantied [*sic*] to him by the Constitution." *Id.*, 1st Sess. App. 81 (Rep. Bingham); see *Monell*, 436 U.S. at 686 n.45. Even the Act's critics described § 1 of the Act as "authoriz[ing] any person who is deprived of any right, privilege, or immunity secured to him *by the Constitution* of the United States, to bring an action against the wrongdoer in the Federal Courts." Cong. Globe, 42d Cong., 1st Sess. App. 216 (1871) (Sen. Thurman) (emphasis added).

Thus, the legislative history demonstrates that a § 1983 claim is defined by the constitutional right, privilege, or immunity invoked.

3. Common law torts and § 1983 damages actions bear a superficial likeness because both use the compensatory and deterrent effects of monetary damages "to protect persons from injuries to particular interests." *Carey* v. *Piphus*, 435 U.S. 247, 254-257 (1978); see also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-307 (1986). Indeed, the compensation function is "[t]he cardinal principle of damages in Anglo-American law." *Carey*, 435 U.S. at 254-255. But the "particular interests" protected by § 1983 typically diverge from the "particular interests" protected by tort law.

The unique interests protected by § 1983 are evident in the very title of its enacting statute: "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" 17 Stat. 13 (1871); see also *Monroe*, 365 U.S. at 171 (§ 1983's "purpose is plain from the title" of the statute). Congress was concerned that "state laws might not be enforced" and constitutional

rights—particularly those enshrined in the newly adopted Fourteenth Amendment—"might be denied by the state agencies." *Monroe*, 365 U.S. at 180. Thus, § 1983 "provide[s] a remedy in the federal courts supplementary to any remedy any State might [provide]" because state law, including state tort law, does not adequately protect constitutional interests. *McNeese* v *Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 671-672 (1963).

Specifically, § 1983 provides a means for individuals to vindicate equal protection interests in freedom from racial and other invidious discrimination and due process interests in fair process and in certain fundamental rights. See U.S. Const. amend. XIV These are interests in the rights of individuals against state and local governments and those acting under color of state law, and they lack direct parallels with the common law tort system, which is primarily concerned with the competing interests of individuals. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

Unlike § 1983, state tort law focuses exclusively on mediating common law interests in persons and property. See, *e.g.*, *Sapp* v. *Ford Motor Co.*, 687 S.E.2d 47, 49 (S.C. 2009) ("Tort law . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."); 1 Dan B. Dobbs et al., *The Law of Torts* § 3, at 5 (2d ed. 2011) (hereinafter *Dobbs' Law of Torts*) (observing that tort law "give[s] the greatest protection to physical security of persons

and property," while also protecting emotional and economic security in limited circumstances).

The interests protected by common law torts are surely important and may overlap in some circumstances with § 1983's interest in protecting constitutional rights. But they will not always overlap, and common law interests may, in some situations, be inconsistent with constitutional principles. As the Court observed in a parallel context in *Bivens* v. *Six Unknown Named Agents*, "[t]he interests protected by state laws and those protected by the Fourth Amendmen[t]" and other constitutional provisions "may be inconsistent or even hostile." 403 U.S. 388, 394 (1971) (giving as an example the different legal effect of consent in common-law trespass and the Fourth Amendment). To treat them as identical is to ignore § 1983's focus on enforcing the Constitution.

B. This Court Has Consistently Recognized That Tort Law Does Not Determine The Scope Of § 1983.

This Court has never held that tort law determines the elements of a § 1983 claim. To the contrary, the Court has emphasized that § 1983 must not be read to permit the Fourteenth Amendment (including incorporated provisions of the Bill of Rights) to become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); accord *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1504 (2012) (§ 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more"); *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (interpreting the criminal counterpart to

§ 1983 and concluding that "Congress . did not undertake to make all torts of state officials federal crimes").

The Court has defined the two "essential elements" of a § 1983 claim, derived from the text, history, and purpose of the statute, as: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels*, 474 U.S. 327. Common law tort requirements control neither of those elements.

To be sure, as discussed below, the Court has referred to background principles of tort law to help fashion a workable action for damages arising from constitutional violations by state actors. See Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 32 (1974) (hereinafter Nahmod, *Tort Liability*) ("To the extent that tort concepts of duty, proximate cause, and cause in fact, as well as various defenses such as consent may assist a court *by analogy* in deciding 1983 cases, well and good. But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability "). However, the Court has repeatedly cautioned against unthinking importation of common law requirements, especially where § 1983 or the relevant constitutional provisions counsel against it. See *Wyatt* v *Cole*, 504 U.S. 158, 164 (1992) ("irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions"); *Anderson* v. *Creighton*, 483 U.S. 635, 645

(1987) ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law").

1. In its seminal decision in *Monroe* v. *Pape*—which applied ordinary proximate causation principles to § 1983 actions while rejecting a specific intent requirement—this Court declared that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. The Court's reference to the "background of tort liability" unfortunately caused confusion in many courts, some of which treated it as an invitation to import tort law requirements of negligence and gross negligence. See Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441, 1447-1448 (1989) (noting that *Monroe* "led lower courts on a fool's errand"); Nahmod, *Tort Liability*, *supra*, at 12-13 (observing that lower courts have "seized upon" the language but given "little consideration . to the background of 1983 liability").

After twenty years of confusion, the Court clarified that § 1983 imposes no independent state-of-mind requirement as a matter of *statutory* interpretation. See *Parratt*, 451 U.S. at 535. Instead, any state-of-mind requirements come from the underlying constitutional provisions allegedly violated. See *Daniels*, 474 U.S. at 330-336 (violation of due process clause requires more than negligence). Importing any of the common law elements of malicious prosecution into § 1983 "malicious prosecution" claims would repeat the earlier mistake of importing common law negligence and gross negligence principles into § 1983 after *Monroe*.

2. When this Court has looked to common law tort principles in considering the elements of, and defenses to, a § 1983 action, it has been highly discriminating. The Court's borrowing from the common law occurs in areas such as causation, damages, and immunity where consideration of common law principles can be helpful in shaping a damages action against state actors for constitutional violations. But even in those areas, the Court has refused to incorporate many common law tort rules.

Thus, in *Carey* v. *Piphus*, 435 U.S. 247, 254-266 (1978), the Court ruled that § 1983 damages for a procedural due process violation shared the compensatory purpose of tort damages, but it refused to permit the kind of presumed damages that are available in some tort actions. The Court explained that "[i]t is not clear . that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case" because sometimes "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Id.* at 258. "In order to further the purpose of § 1983," the Court therefore held that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 258-259. In the Court's view, proof of actual damages best comported with the purposes of procedural due process protections.

Other damages and causation decisions have taken a similarly limited approach. See *Memphis Cmty.*, 477 U.S. at 310, 311 n.14 ("damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of

compensatory damages" in § 1983 cases notwithstanding common law decisions supporting such damages); *Hartman* v. *Moore*, 547 U.S. 250, 258-266 (2006) (declining to rely on common law analogues in adopting no-probable-cause requirement for *Bivens* First Amendment retaliatory prosecution claim: while "we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, . the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts"); *Monell*, 436 U.S. at 691-695 (rejecting § 1983 municipal liability under common law *respondeat superior* theory as inconsistent with § 1983's purpose and history).

Section 1983 immunity rulings likewise borrow only selectively from common law tort rules. Only "[w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act" has the Court read § 1983 to incorporate the immunity. *Owen* v. *City of Indep., Mo.*, 445 U.S. 622, 638 (1980); see also *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976) (prosecutorial immunity case where Court asked "whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983").

Consistent with that approach, the Court has repeatedly refused to follow common law immunity principles in defining § 1983 immunities. See *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (recognizing that objective reasonableness standard for qualified immunity departs from common law malice requirement); *Owen*, 445 U.S. at 644, 647-650 (rejecting

immunity from compensatory damages liability for municipalities despite common law doctrines granting such immunity); *Imbler*, 424 U.S. at 424-427 (granting prosecutors absolute immunity even though some jurisdictions provided only qualified immunity under the common law); *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-243 (1974) (rejecting absolute immunity for high-ranking executive officials even though they sometimes had absolute immunity under the common law).

3. Nothing in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), requires a different approach for § 1983 "malicious prosecution" claims. *Heck* analogized to the elements of common law malicious prosecution in adopting a favorable termination requirement for § 1983 suits that necessarily challenge a plaintiff's criminal conviction or sentence. *Id.* at 483-485. But the Court adopted that requirement not because it is an element of the common law tort. Rather, it did so because Congress determined that all challenges to a conviction or sentence—whatever their constitutional basis, and even when they seek damages—should be pursued through the specialized habeas corpus remedy available to convicted prisoners, not through general § 1983 remedies. See *id.* at 481-482, 484-485 & n.4; see also *Preiser* v. *Rodriguez*, 411 U.S. 475, 488-490 (1973) (recognizing same principle). *Heck* is emphatically *not* a § 1983 "malicious prosecution" case.

Indeed, when the Court subsequently ruled that the *Heck* favorable termination rule does not apply when there is no existing criminal conviction, it made clear that it was resolving "a question of federal law that is *not* resolved by reference to state law." *Wallace* v. *Kato*, 549 U.S. 384, 388 (2007). The Court

also reaffirmed that *Heck* rested on Congress's determination that federal habeas corpus is the appropriate remedy when prisoners attack their state court convictions or sentences. *Id.* at 392-393 (citing *Heck*, 512 U.S. at 482).

II. THIS COURT SHOULD NOT IMPORT THE ELEMENTS OF COMMON LAW MALICIOUS PROSECUTION INTO PETITIONER'S § 1983 CLAIM FOR UNLAWFUL PRETRIAL DETENTION.

There are no persuasive reasons for the Court to use the elements of common law malicious prosecution to define Petitioner's § 1983 "malicious prosecution" claim for unlawful pretrial detention. In fact, the opposite is true: importing those elements into § 1983 law would interfere with the vindication of constitutional rights, create a host of practical problems, and contradict established § 1983 law and policy. Accordingly, the Court should not permit Petitioner to invoke the favorable termination element of the malicious prosecution tort that his certiorari petition (at 21) acknowledges is necessary to save his § 1983 claim from dismissal on statute of limitations grounds.

A. Common Law Elements Of Malicious Prosecution Provide A Poor Foundation For A § 1983 Claim.

Slavish adoption of the common law elements of malicious prosecution improperly shifts the focus away from the constitutional rights, privileges, and immunities at the heart of any § 1983 action. At the same time, it creates hopeless indeterminacy given the differences in the common law across jurisdictions and time.

1. Even to speak in terms of a § 1983 "malicious prosecution" claim distorts the analysis and directs attention away from the real inquiry—the requirements of § 1983 and the underlying constitutional provision allegedly violated. Yet many lower courts have apparently misunderstood this Court's approach *permitting* consideration of background tort principles as an *instruction* that they must start with the tort elements of malicious prosecution before considering the constitutional right at issue. See, *e.g.*, *Castellano*, 352 F.3d at 945 ("we first look at the state law tort of malicious prosecution and then look to the enforcement of constitutional protections"). Indeed, several courts of appeals have held that plaintiffs in § 1983 "malicious prosecution" cases must establish all of the elements of the common law tort of malicious prosecution *and* a violation of their constitutional rights. See, *e.g.*, *Grider* v. *City of Auburn, Ala.*, 618 F.3d 1240, 1256 (11th Cir. 2010).

That approach leads to disturbing results completely at odds with § 1983's focus on the vindication of constitutional rights. It seriously *under-protects* constitutional rights because plaintiffs who can show a deprivation of their constitutional rights by a state actor causing compensable injury might nevertheless be unable to state a claim if they cannot establish all of the common law elements of malicious prosecution. As the United States acknowledges, the elements of malicious prosecution "are not a perfect fit" with claims for violations of constitutional provisions like the Fourth Amendment. See U.S. Br. 24 n.15; see also Alschuler Br. 16 ("confusion arises" because "the common-law tort and the constitutional provision address different injuries").

The far better and simpler approach is to deem irrelevant the malicious prosecution elements and instead ask: (1) what does the applicable constitutional provision require to establish unlawful pretrial detention?; and (2) what does § 1983 require to establish damages liability? It may turn out that something akin to a common law malicious prosecution element still must be pleaded and proved in a particular case. But that would be a consequence of constitutional law, not state tort law. In other words, "if a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'" *Newsome*, 256 F.3d at 751.

2. In addition, it is inappropriate to use the common law of torts as the starting point for defining the elements of § 1983 claims because there is no *one* common law of torts from which to begin. Common law torts are creations of state law and their elements must therefore be determined with respect to the laws of a particular state. See, *e.g.*, *Swartz* v. *Insogna*, 704 F.3d 105, 111-112 (2d Cir. 2013) (drawing elements of § 1983 "malicious prosecution" claim from New York law). And the elements of malicious prosecution vary among the states.

For example, one element of malicious prosecution is the initiation of a criminal proceeding against the plaintiff by the defendant. Although a majority of states hold that this element is satisfied even if the prosecuting court had no jurisdiction over the plaintiff, some states do not. See W Page Keeton et al., *Prosser and Keeton on the Law of Torts* 871 (5th ed. 1984) (hereinafter *Prosser and Keeton*). Thus plaintiffs whose constitutional rights are violated when they are detained, charged, and prosecuted for an of-

fense that is not recognized by the criminal law could satisfy the elements of malicious prosecution and state a claim under § 1983 in Arizona, but not in North Carolina. Compare *George* v. *Williams*, 222 P 410, 411 (Ariz. 1924), with *Moser* v. *Fulk*, 74 S.E.2d 729, 731 (N.C. 1953).

States also vary in their approach to the favorable termination element of malicious prosecution. Some states require a termination suggesting innocence, while others find a favorable termination in any sort of dismissal, even on procedural grounds. See *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 664 (10th Cir. 2016) (Gorsuch, J., concurring). It would be a strange rule indeed that would allow the substantive requirements for using a federal statute to assert federal constitutional rights to vary according to state substantive law.

The common law of malicious prosecution has changed over time as well. When § 1983 was enacted, a "defendant's conviction, under Reconstruction-era common law, dissolved his claim for malicious prosecution because the conviction was regarded as irrebuttable evidence that the prosecution never lacked probable cause." *Heck*, 512 U.S. at 496 (Souter, J., concurring). Thus, deriving the elements of a § 1983 claim for unlawful pretrial detention from the common law tort of malicious prosecution "would logically drive one to the position, untenable as a matter of statutory interpretation (and, to be clear, disclaimed by the Court), that conviction of a crime wipes out a person's § 1983 claim for damages for unconstitutional conviction or postconviction confinement." *Ibid.*

Looking instead to the modern law of malicious prosecution does not solve the problem either. Not

only would this modern law be completely outside the knowledge of the authors of § 1983, but, as the Petitioner's *amici* point out, many states have changed their approach to malicious-prosecution actions in recent years. See Nat'l Police Accountability Project Br. 6-19.

B. There Is No Sound Reason To Adopt, As A Matter Of § 1983 Law And Policy, Any Of The Common Law Elements Of Malicious Prosecution.

The common law elements of malicious prosecution often are defined as (1) initiation of legal proceedings against the plaintiff, (2) favorable termination of those proceedings, (3) absence of probable cause, and (4) malice. See 3 *Dobbs' Law of Torts* § 586, at 388-389. Contrary to the position that Petitioner takes to save his claim from the statute of limitations, none of these elements should, as a matter of § 1983 law and policy, be deemed an element of Petitioner's unlawful detention claim.

1. The initiation of legal proceedings is not an essential part of an unlawful detention claim. Some such claims are based on detention before legal proceedings. See, *e.g.*, *Parsons* v. *City of Pontiac*, 533 F.3d 492, 504 (6th Cir. 2008). Others are based on detention after legal proceedings. See, *e.g.*, *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013). To be sure, an issue in this case is whether the initiation of legal process affects the constitutional basis for an unlawful detention claim. But that fact merely confirms that any requirement of initiation of legal proceedings would come from the Constitution, not § 1983.

Adoption of such a requirement could also needlessly complicate the law. As discussed above, states disagree on whether the initiation of criminal proceedings without proper jurisdiction satisfies this element. See *Prosser and Keeton* 871. Importing this element from the common law tort would raise difficult questions of whether and how the initiation of an invalid prosecution could trigger § 1983 liability. See Part II.A, *supra*.

2. Making the termination of criminal proceedings in favor of the accused a prerequisite for all § 1983 "malicious prosecution" suits alleging unlawful pretrial detention would contradict established precedents of this Court. Under *Heck*, of course, a plaintiff who has been criminally convicted cannot assert a claim for unlawful detention that, if successful, would undermine that conviction, until he or she obtains a favorable termination of the criminal proceedings. But *Wallace* held that the *Heck* bar applies only to plaintiffs with existing convictions. 549 U.S. at 393. As the Court observed, "§ 1983 actions, unlike the tort of malicious prosecution which *Heck* took as its model, sometimes accrue before the setting aside of—indeed, even before the existence of—the related criminal conviction." *Id.* at 394 (citation omitted).

In this case—where Petitioner was never convicted of a crime related to his allegedly unlawful detention—adopting a favorable termination requirement would be inconsistent with *Wallace*.[2]

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[2] In its brief supporting Petitioner, the United States draws the wrong lessons from *Heck* (and, by extension, *Wallace*). See also Alschuler Br. 19 n.7 (adopting the same mistaken reading of *Heck*). The government argues that the common law rationales for a favorable termination requirement mean that favorable termination "similarly should be required before the claimant is

3. Absence of probable cause frequently is at issue in § 1983 cases alleging unlawful pretrial detention. But that is not because it is a common law element of malicious prosecution. Rather, *constitutional principles* may require consideration of probable cause. Thus, in an unlawful detention case based on the Fourth Amendment, the absence of probable cause would likely be an element. See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 126 (1975); see also *Hartman*, 547 U.S. at 258, 265-266 (requiring proof of no-probable-cause in *Bivens* First Amendment retaliatory prosecution case as a matter of constitutional tort causation policy, not because of any common law tort rule).

4. Adopting the malice element of common law malicious prosecution, as a matter of § 1983 law, would be flatly inconsistent with this Court's holding that, as a matter of statutory interpretation, "§ 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels*, 474 U.S. at 329-330. Requiring § 1983 plaintiffs to establish the malice element of malicious prosecution would improperly inject malice into the constitutional analysis and would be inconsistent with the state-of-mind requirements of many constitutional rights. See, *e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) (Fourth Amendment analysis looks to objec-

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permitted to challenge the probable cause for his detention" pursuant to legal process. U.S. Br. 24-25 n.16. But it never explains why a rule founded on the conflict between § 1983 and federal habeas law when there is a state court "conviction or sentence," *Heck*, 512 U.S. at 486-487, should also apply when there has been no conviction or sentence. Where there is no conviction, *Wallace* makes abundantly clear that *Heck*'s accrual rule does not apply. See *Wallace*, 549 U.S. at 393-394.

tive reasonableness "without regard" to "underlying intent or motivation"); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (purposeful discrimination, not malice, required for equal protection violation).

Petitioner's *amici* who address the issue agree that the common law element of malice has no place in § 1983 claims. The United States, while advocating an "intent" requirement, concedes that this element "is not directly akin to the common-law element of 'malice.'" U.S. Br. 25 n.17. And the National Association of Criminal Defense Lawyers completely rejects the common law malice element. It correctly argues that "nothing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis." NACDL Br. 22.

5. Finally, it must be emphasized that eliminating malicious prosecution elements from the § 1983 analysis would treat § 1983 plaintiffs and § 1983 defendants in an evenhanded manner. Eliminating these elements would sometimes advantage § 1983 plaintiffs, sometimes § 1983 defendants, depending on the facts of the particular case. Plaintiffs would be relieved of the burdens of proving favorable termination, the absence of probable cause (unless the Fourth Amendment were involved), and malice. As a result, the protection of constitutional rights would be directly advanced.

At the same time, defendants in non-*Heck* cases would be able to focus on when the § 1983 cause of action accrued for statute of limitations purposes, without being concerned about a favorable termination requirement that unduly extended the limitations period. This would reduce the risk of overprotecting constitutional rights at the expense of the

important "policies of repose" furthered by statutes of limitation. See *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (describing those policies in § 1983 statute of limitations case: "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.").

Significantly, in *Heck* cases—where a § 1983 claim calls into question an existing conviction based on law enforcement misconduct or other grounds—eliminating malicious prosecution elements from the § 1983 analysis would not affect accrual. Under *Heck*, such claims do not ordinarily accrue in any event until after the conviction is overturned.

CONCLUSION

However the Court resolves the Fourth Amendment issue posed in the Question Presented, the Court should clarify and rationalize § 1983 jurisprudence by ending the § 1983 "malicious prosecution" guessing game. As a matter of sound § 1983 interpretation and policy, it should divorce the elements of the tort of malicious prosecution from analysis of the § 1983 claim. These elements should be sent back where they belong: to the common law of malicious prosecution.

Because Petitioner states that he needs a favorable termination requirement to prevail, the judgment of the court of appeals upholding dismissal of his claims should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER, AND SUGGESTING REVERSAL

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INTEREST OF *AMICUS CURIAE* [1]

The National Association for Public Defense ("NAPD") is an association of approximately 13,000 public defense practitioners. Formed in 2013, 50 years after this Court recognized the right to counsel as "fundamental and essential," *Gideon v. Wainright*, 372 U.S. 335, 344 (1963), NAPD's mission is to fulfill *Gideon*'s promise of fairness and equal access to justice in America's criminal courts. NAPD is dedicated to defending liberty, to conveying dignity, and to protecting the constitutional rights of indigent defendants who—due to their poverty—are often treated as if they have forfeited those rights.

NAPD includes every professional who is critical to delivering the right to counsel: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, civil legal aid providers, education advocates, expert support, information technology gurus, teachers and trainers, financial professionals, researchers, legislative advocates, communications personnel, and administrative personnel. NAPD's collective expertise represents the full array of public defender systems: state, county and local systems.

While NAPD fully supports the arguments set forth by Petitioner, it writes separately as *amicus curiae* to highlight for the Court its unique

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[1] The parties have consented to the filing of this brief and filed their letters of consent with the Clerk on April 12 and 15, 2016. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

perspective as a systemic participant in the day-to-day functioning of the criminal justice system. From this vantage point, NAPD has often observed the collateral harms that can, and frequently do, befall individuals who are detained for lengthy periods before trial, and NAPD's observations highlight the high stakes that are involved as this Court decides whether the Fourth Amendment provides a complete and adequate remedy for individuals who have been unreasonably seized and detained after the initiation of legal process.

SUMMARY OF ARGUMENT

Elijah Manuel spent 48 days in jail even though the police officers who had unreasonably seized him had no basis whatsoever to believe he had committed any crime. During those weeks of improper detention, he could not work or complete his college coursework. He was forced to drop out of college (though he remained on the hook financially for the tuition). He defaulted on his student loan obligations and other bills. He lost his apartment. His credit score suffered. His reputation was tarnished.

These consequences are not unique to Mr. Manuel. Each and every day, in jails across the United States, hundreds of thousands of individuals are subject to prolonged periods of pretrial detention.[2] Admittedly, some of those

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[2] At the midpoint of 2014, the last year for which statistics are available, 467,500 unconvicted persons were detained in local U.S. jails. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, at 3 (June 2015), http://goo.gl/R3XzEv. Overall, approximately 6 in 10 jail inmates were in jail awaiting court action or on a current charge—a rate unchanged since 2005. *Id.*

individuals are dangerous and detention is warranted. "[B]ut a significant number are charged with nonviolent offenses and simply cannot afford relatively modest bonds imposed to assure their presence at future court appearances." Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 Yale L.J. 1344, 1346 (2014). This reality makes it more likely that individuals who are unlawfully detained will suffer greater harms because they will not be able to post bond. The harms themselves range in severity, but frequently come in the form of loss of employment, loss of housing, strain on family relationships, and physical and mental health effects.

These collateral consequences are especially egregious when an individual has been wrongfully arrested and detained for a lengthy period of time. A damages remedy cannot make that person whole. But interpreting the Fourth Amendment to permit malicious prosecution claims as a remedy for all of the many harms that result directly from the unreasonable seizure of individuals after the initiation of legal process but without probable cause is critical to those who are unjustly caught up in the system.

ARGUMENT

I. PRETRIAL DETAINEES ARE SUBJECT TO A VORTEX OF HARMS

More than forty years ago, this Court recognized the "detrimental impact" that pretrial incarceration can have on an individual. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). "It often means loss of a job; it disrupts family life; and it enforces idleness." *Id.* The consequences of pretrial

detention can push an individual off track for just long enough and just seriously enough to make their post-release lives a constant uphill battle.

A. *Economic Effects*

A detainee's economic troubles rank at or near the top of the list of the deleterious collateral results of pretrial detention, and often contribute to a downward spiral of other problems. It usually starts when the detainee loses his job, which can happen even if he is jailed for a short time—"either because the employer does not want to be associated with someone under indictment or because the defendant cannot make bail and cannot show up for work." Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. Rev. 1297, 1308 (2000). Without income, a detainee can fall behind on bills and rent—a problem that often continues after his release. Then, in a domino effect, that can lead to the detainee losing his housing, his car, and other basic necessities. Wiseman, 123 Yale L.J. at 1356-57.

Even when a detainee re-enters the community, he faces an onerous struggle in finding a job. Any time spent in jail creates social stigma, and it is well known that employers are generally averse to hiring individuals with arrest records, even if they were never convicted. Leipold, 94 Nw. U. L. Rev. at 1308; Amanda Petteruti & Nastassia Walsh, Justice Policy Inst., *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, at 17 (Apr. 1, 2008), http://goo.gl/n02mTi.

B. *Family Relationships*

Family relationships also suffer greatly as a result of pretrial detention. Family members experience emotional and economic hardships and declining health—attributable to the stress, financial strain, and social stigma of the circumstances. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297, 1320 (2012); Petteruti & Walsh at 17. "Often, family members must adjust their lives to take care of a displaced child." *Id.* at 17-18. Those family members face "reduced earning potential and difficulty finding child care, even as debts and expenses associated with court and legal fees mount." KJ Dell'Antionia, *When Parents Are in Prison, Children Suffer*, N.Y. Times: Well (Apr. 26, 2016, 10:48 a.m.), http://nyti.ms/26rrf8O. Otherwise, children of detainees frequently wind up in foster care. Appleman, 69 Wash. & Lee L. Rev. at 1319-20.

Regardless of where the children of detainees find themselves, they are subject to "significant uncertainty and instability." Nancy G. La Vigne, *et al.*, Urban Institute Justice Policy Center, *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, at 1 (Feb. 2008), http://goo.gl/54g9Eg. They might be separated from their siblings and friends. *Id.* at 4. They are likely to face greater financial hardship than other children. *Id.* at 5.

Moreover, "the barriers to communication between a child and his or her incarcerated parent are tremendous," especially when caregivers are reluctant to facilitate such contact. *Id.* at 1.

Making arrangements to visit a detainee can be "time consuming, expensive, and difficult to coordinate." *Id.* at 4. And while there are resources available to help prepare a child to visit a parent in jail, *see, e.g.*, Sesame Street, *Little Children Big Challenges: Incarceration, A Guide to Support Parents and Caregivers*, www.sesamestreet.org/incarceration, the "intimidating, uncomfortable, and humiliating conditions" that are designed to promote safety within the facility may have the effect of discouraging future contact. La Vigne, *et al.* at 5.

C. *Mental and Physical Health*

"Conditions in all jails have a negative impact on the health and well-being of the people in them," even those who enter jail healthy. Petteruti & Walsh at 15. This is partly because jail complexes are often old and decaying, and therefore "have various dangers associated with them, including mold, poor ventilation, lead pipes, and asbestos." Appleman, 69 Wash. & Lee L. Rev. at 1318. This environment "can be very detrimental to the health of pretrial detainees." *Id.* Moreover, the intense concentration of prisoners (who are constantly in flux), staff, and visitors make jails "vector[s] of contagious diseases," including serious infections and sexually transmitted diseases. *Id.*

"Pretrial incarceration is particularly difficult for those who suffer from poor health, as jails rarely have adequate resources available to treat people with physical or mental health problems." *Id.* Jails tend to be ill-equipped to deal with detainees' serious health problems, "and what

healthcare is available is hard to provide to jails' often short-term visitors." *Id.* at 1318-19.[3]

Moreover, pretrial detention exacerbates mental illness, which puts detainees at risk of harming themselves or others. *Id.* at 1319. Indeed, suicide has been the leading cause of death in local jails since 2000, and unconvicted jail inmates are more likely to commit suicide than convicted inmates. Margaret Noonan, *et al.*, Bureau of Justice Statistics, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables*, at 12 (Aug. 2015), http://goo.gl/vz32k8. Jails have a higher suicide rate (46 per 100,000 in 2013) than even prisons (15 per 100,000), *id.* at 3, 21, which can be explained in part by the "shock of confinement" felt by those who are jailed for the first time and find themselves "stripped of their job, housing, and basic sense of normalcy." Maurice Chammah & Tom Meagher, The Marshall Project, *Why Jails Have More Suicides Than Prisons*, (Aug. 4, 2015), https://goo.gl/uq3HAi.

D. *Legal Implications*

The time immediately preceding trial is critical to the legal proceedings as a whole—in particular to the development of the accused's defense, and to his ability to prove his innocence

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[3] These negative effects are not limited to the time a detainee actually spends in jail. Many inmates become ineligible for health benefits while they are in jail, meaning that when they are released they are often "forced to rely on emergency rooms for even the most routine medical treatments." Thus, even after an individual is released, the burden on taxpayers continues. *Attorney General Eric Holder Speaks at the National Symposium on Pretrial Justice* (June 1, 2011), https://goo.gl/qbu4Nz.

and secure his quick release. But without a doubt, "the limitations imposed by incarceration" hamper those essential preparations. *Campbell v. McGruder*, 580 F.2d 521, 532 (D.C. Cir. 1978) (internal quotation marks and citation omitted). In *Barker*, this Court recognized that "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. "Indeed, the defendant is often the key source of factual details on which to base pretrial motions and negotiations. A defendant free on bail or on his own recognizance can therefore make good use of that liberty by consulting and participating fully with counsel in time-consuming preparations for trial, including tracking down witnesses and evidentiary leads." *People v. Johnson*, No. 37, 2016 N.Y. LEXIS 752, at *16 (N.Y Apr. 5, 2016) (internal citations and quotation marks omitted). An individual who is detained before trial cannot.

Empirical studies show a strong correlation between pretrial detention and a negative trial outcome. In fact, when a defendant is at liberty pending trial, he stands a better chance of not being convicted at all. *Campbell*, 580 F.2d at 531.

II. SECTION 1983 CLAIMS INVOLVING PRETRIAL DETENTIONS WITHOUT PROBABLE CAUSE SHOULD BE COGNIZABLE UNDER THE FOURTH AMENDMENT

The serious and multiple harms discussed above weigh strongly in favor of an interpretation of the Fourth Amendment that provides a remedy for individuals who have been wrongfully detained after the initiation of legal process. Such a remedy

would further the core purposes of 42 U.S.C. § 1983, which are to compensate victims of constitutional torts and to deter future constitutional violations. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

Section 1983 was "intended to create a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (internal quotation marks and alterations omitted). Thus, Section 1983 makes damages available when an individual's constitutional rights have been violated and when he has suffered compensable injury. *Id.* at 255.

When a plaintiff seeks damages pursuant to Section 1983 for violations of constitutional rights, the courts look to principles derived from the common law of torts. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). Tort law has long recognized that a malicious prosecution can cause "unjustified torment and anguish" of the very sorts described above. *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 119, pp. 870-89 (5th ed. 1984); T. Cooley, *Law of Torts* 180-87 (1879)).

The consequences of pretrial detention are serious for anyone who has not yet been convicted of a crime, but "[i]t is especially unfortunate to impose them on those persons who are ultimately

found to be innocent." *Barker v. Wingo*, 407 U.S. 514, 533 (1972). "[A] wrongful indictment . often works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal." *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947). As the accused struggle to find their footing in the community, they are routinely saddled with debt (often from legal bills stemming from their wrongful arrest and detention) and in poor health, and they must repair their relationships with friends and family.

Making Fourth Amendment claims available to those wrongfully detained for prolonged periods of time after the initiation of legal process would not only "compensate persons for injuries caused by the deprivation of rights," *Carey*, 435 U.S. at 255, but doing so would also "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Richardson v. Knight*, 521 U.S. 399, 403 (1997) (internal quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ELIJAH MANUEL

Petitioner,

v.

CITY OF JOLIET, ET AL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a time-barred Fourth Amendment claim, alleging that the plaintiff was arrested without probable cause, gives rise to a separate Fourth Amendment "malicious prosecution" claim against the arresting officers when prosecutors bring charges stemming from the arrest, the limitations period for which begins to run after the prosecution is concluded and the arrestee is released from custody.

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INTEREST OF THE *AMICI CURIAE*

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services. Amici monitor and analyze legal developments that have an impact on local governments, and take positions advocating for greater protection of government officials as they serve the public.[1]

The National Association of Counties (NACo) represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 State municipal leagues, the NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

STATEMENT OF THE CASE

The amended complaint alleges that on March 18, 2011, respondent Terrence J. Gruber, an officer of the Joliet, Illinois, Police Department, stopped petitioner's vehicle, forcibly removed petitioner from the front passenger's seat of the vehicle, placed him under arrest, pushed him to the ground injuring petitioner's back, head, and hand, all without probable cause to support a lawful arrest, and employing excessive force. J.A. 62-63.[2] Officer Gruber then performed a search of petitioner's person, finding a bottle of vitamins. J.A. 63-64. Another officer performed a field test on the on the pills within the bottle, which indicated that they did not contain a controlled substance, but Officer Gruber placed petitioner under arrest despite the negative test result. J.A. 69-70.

Petitioner was transported to a police facility, where another respondent, Sergeant Scott Cammack, again

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[2] Because this case is before the Court on the sufficiency of petitioner's first amended complaint, we take all nonconclusory factual allegations in that pleading as true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009).

tested the pills. J.A. 70. Petitioner "is informed and believes that the test results showed that that the pills were not a controlled substance." *Id.* Nevertheless, Officer Gruber, Sgt. Cammack, and the other respondent officers involved in petitioner's arrest "caused false criminal charges to be brought against p[etitioner] for possession of a controlled substance, with intent to deliver." J.A. 71. That day, Officer Jeffrey Kneller, also a respondent, executed under oath a complaint charging petitioner with possession of a controlled substance. J.A. 52-53.

The records of the Circuit Court of Will County, Illinois, indicate that on the day of his arrest, petitioner appeared before a judge on the drug charge, counsel was appointed to represent him, the judge found that the charge was supported by probable cause, set bond, and remanded petitioner to the custody of the county jail. Pet. Br. 4-5.

On March 30, Officer Gruber testified before the Will County Grand Jury that during the traffic stop, after detecting the odor of cannabis, he arrested petitioner and, during a search incident to arrest, recovered pills that, according to a field test, contained methylenedioxymethampheamine, or ecstasy, a controlled substance. J.A. 96. Based on that testimony, the grand jury returned an indictment charging petitioner with unlawful possession of a controlled substance. J.A. 54-55.

The Illinois state crime laboratory tested the pills recovered from petitioner and, in a report dated April 1, 2011, found that they did not contain a controlled substance. J.A. 51. On May 4, the prosecution's motion to dismiss the charge against petitioner was granted, and he was released from custody the next day. J.A. 34, 101.

On April 10, 2013, petitioner brought suit against the City of Joliet and the officials involved in his arrest, alleging a violation of his constitutional rights actionable under 42 U.S.C. § 1983. J.A. 102. The district court dismissed the action on the ground that petitioner's action was barred by the applicable statute of limitations because it had not been brought within two years of his allegedly unconstitutional arrest. J.A. 98-99.

The court of appeals affirmed, concluding that although petitioner had tried to avoid the limitations bar by styling his action as a "malicious-prosecution claim," J.A. 102, "there is nothing but confusion gained by calling [a] legal theory [brought under the Fourth Amendment or any other amendment] 'malicious prosecution.'" J.A. 103 (quoting *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) (brackets in original)). It agreed with the district court that "any Fourth Amendment claim that Manuel might bring is time-barred." *Id.*

SUMMARY OF THE ARGUMENT

Petitioner's claim that the officers involved in his arrest violated his Fourth Amendment rights is barred by the applicable two-year statute of limitations.

The Fourth Amendment is violated when an allegedly unconstitutional search or seizure occurs, not when an ensuing criminal case is resolved. The statute of limitations on a Fourth Amendment false-arrest claim begins to run when the arrestee appears in court, leaving the custody of the arresting officers. At that point, one arrested without probable has a right to sue for an allegedly unconstitutional arrest, regardless whether he is later prosecuted as a consequence of the arrest.

Although petitioner characterizes the criminal case against him as a "malicious prosecution," the Fourth Amendment forbids unreasonable searches and seizures, rather than unwarranted or malicious prosecutions. Petitioner's submission, moreover, would permit plaintiffs to bring decades-old Fourth Amendment claims when they finally emerge from prison. In our experience, petitioner's submission would give life to an enormous volume of stale claims, undermining critical policies basic to section 1983's embrace of state statutes of limitation.

Equally important, section 1983 permits petitioner to sue for a violation of his constitutional rights, not for common-law torts such as malicious prosecution. Indeed, the tort of malicious prosecution developed so that private parties could be held accountable for wrongful prosecutions they pressed against others in pursuit of private interests. These considerations have no fair application to the liability of public prosecutors and police, who are politically accountable for wrongful prosecutions.

Accordingly, petitioner's Fourth Amendment claim accrued when he left the arresting officers' custody and appeared in court. This action is therefore time-barred.

ARGUMENT

Petitioner's amended complaint states that his "action arises under the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. § 1983)." J.A. 59. In this Court, petitioner presses only what he calls a "malicious prosecution claim[] for pretrial detention under the Fourth Amendment." Pet. Br. 10.

Section 1983 makes actionable "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (2012). Accordingly, "[t]he first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

By alleging that his arrest was unsupported by probable cause, petitioner's complaint describes a violation of the Fourth Amendment, actionable under section 1983. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004). *Cf. Malley v. Briggs*, 475 U.S. 335, 345 (1986) (officer can be liable for obtaining arrest warrant unsupported by probable cause). That claim accrued, however, when petitioner left the custody of the arresting officers. The statute of limitations on section 1983 claims in Illinois is the two-year period for actions on a personal injury. *See, e.g.*, *Ashafa v. City of Chicago*, 146 F.3d 459, 461-63 (7th Cir. 1998). This time bar is fatal to petitioner's case.

I. A TIME-BARRED A FOURTH AMENDMENT CLAIM CANNOT BE REVIVED BY RELABELING IT AS A CLAIM FOR MALICIOUS PROSECUTION.

Since petitioner alleged no violation of his Fourth Amendment rights beyond a time-barred claim for arrest without probable cause, his action was properly dismissed.

A. A Fourth Amendment Claim Alleging an Arrest Without Probable Cause Accrues When the Arrestee Appears in Court.

Petitioner's Fourth Amendment claim against the respondent officers accrued when they arrested him, allegedly without probable cause, and is barred by the two-year statute of limitations.

A section 1983 claim accrues, and the limitations period begins to run, "'when the plaintiff has a 'complete and present cause of action,' that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 201 (1997) (citations and further internal quotations omitted)). *Accord, e.g.*, *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016).

When an individual is arrested without probable cause, his Fourth Amendment rights are violated, and he accrues a right to sue. After all, "[t]he wrong condemned by the Fourth Amendment is 'fully accomplished' by the unlawful search or seizure itself" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). *Accord, e.g., Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998); *Arizona v. Evans*, 514 U.S. 1, 10 (1995).[3]

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[3] Moreover, because accrual turns on when the plaintiff acquired a right to relief under the Constitution or laws of the United States, "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388.

It matters not whether an arrestee subsequently faces criminal charges as a result of an arrest, accompanied by pretrial detention, or that the arresting officers allegedly provided false information about the arrest to prosecutors. The Fourth Amendment is violated by "unreasonable searches and seizures," U.S. Const. amend. IV, not information that police provide to prosecutors, or a charging document that prosecutors thereafter choose to file.

To be sure, an ensuing prosecution may well be a continuing adverse consequence of an arrest in violation of the Fourth Amendment for which an arrestee can recover damages—a question we consider in Part II.C below—but the fact that a plaintiff continues to experience adverse consequences flowing from an unlawful act does not delay the running of the limitations period. Were the rule otherwise, the statute of limitations would never run on the claims of plaintiffs seeking to recover for a permanent disability caused by the defendant's unlawful conduct, since their damages would continue to mount. *Cf. Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam) (section 1983 action alleging retaliatory discharge accrued when plaintiffs received notice of discharge and not when discharge took effect).

Wallace illustrates our point. Wallace brought a section 1983 action based on an allegedly unconstitutional arrest, and contended that his claim did not accrue until he was released from custody following the dismissal of the charges against him "since he is seeking damages up to that time." 549 U.S. at 391. This Court disagreed: "Even assuming that all damages for detention pursuant to legal process could be regarded as consequential damages attributable to the unlawful arrest, that would not alter the

commencement of the statute of limitations." *Id.* That is because a claim "accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages." *Id.* (quoting 1 Calvin W Corman, Limitation of Actions § 112, at 150 (2005)).

The Court observed that Wallace "was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time." 549 U.S. at 390 n.3. The Court added that Wallace had alleged what would have been regarded at common law as the tort of false imprisonment, which "is subject to a distinctive rule – dictated, perhaps, by the reality that the victim may not be able to sue while he is still imprisoned." 549 U.S. at 389. Under that rule, a claim accrues "once the victim becomes held pursuant to [legal] process – when, for example, he is bound over by a magistrate or arraigned on charges." *Id.* (citations and emphasis omitted). In *Wallace*, that occurred "when [Wallace] appeared before the examining magistrate and was bound over for trial." *Id.* at 391. This proved fatal: "Since more than two years elapsed between that date and the filing of this suit the action was time barred." *Id.* at 391-92.[4]

Petitioner endeavors to put *Wallace* aside on the ground that it did not "explore[] the contours of a Fourth Amendment malicious prosecution suit under § 1983 " Pet. Br. 29 (quoting *Wallace*, 549 U.S. at

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[4] As *Wallace* recognized, this accrual rule may result in the commencement of civil litigation while the criminal case is pending or anticipated, but in such cases, rather than somehow manipulating the rules for accrual, if necessary, the district court could "stay the civil action until the criminal case or the likelihood of a criminal case is ended." 549 U.S. at 394.

390 n.2). Malicious prosecution, however, is a state-law tort, not a Fourth Amendment claim.

The Fourth Amendment forbids not unwarranted or malicious prosecutions but unreasonable searches and seizures. Indeed, the tort of malicious prosecution does not even include among its elements a requirement that the plaintiff be subjected to search or seizure. *See* Restatement (Second) of Torts § 653 (1977). *See also* U.S. Br. 24 n.15 ("[A] common law claim of malicious prosecution does not have seizure as an element – a necessary component of a Fourth Amendment claim.").

Accordingly, rebranding a time-barred Fourth Amendment claim as "malicious prosecution" changes nothing of substance. There is no malicious-prosecution clause lurking in the Fourth Amendment. The invocation of a state-law tort theory is simply irrelevant to a section 1983 Fourth Amendment action. *Cf. Rehberg v. Paulk*, 132 S. Ct. 1497, 1504 (2012) ("[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common law claims, an all-in-one federal claim encompassing the torts of malicious prosecution, and more.").

Petitioner's allegation that he was arrested and subsequently detained at a police facility through the course of an evening without probable cause describes a false imprisonment in violation of his right to be free from unreasonable search and seizure under the Fourth Amendment. That Fourth Amendment violation was complete as soon as the allegedly unconstitutional arrest, and its attendant infringement on petitioner's liberty, occurred. As *Wallace* holds, as soon as petitioner left the arresting officers' custody and appeared in court, where he faced a formal charge and

was detained pursuant to the court's bail determination, the statute of limitations began to run.[5]

Petitioner failed to bring suit within two years of the time that he left the custody of the arresting officers and appeared in court. Therefore, petitioner's Fourth Amendment claim is now time-barred.

B. Judicially-Authorized Pretrial Detention Following an Arrest Is Not a Continuing Seizure by the Arresting Officers.

Petitioner argues that he has alleged a Fourth Amendment violation that lasted until he was released from custody, arguing that "anyone who is arrested and put in jail is seized from arrest until release " Pet Br. 22.[6]

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[5] Petitioner makes no argument that any doctrine tolled the running of the statute of limitations while the charge against him was pending. *Wallace*, moreover, concluded that no such tolling doctrine exists. *See* 549 U.S. at 394-97. And, though the allegation is unquestionably disturbing, petitioner makes no argument that his claim that excessive force was used during his arrest is timely even under his theory of "malicious prosecution."

[6] This suggestion admittedly receives some support from Justice Ginsburg's separate opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), in which she opined that a person may be considered "seized" for Fourth Amendment purposes "so long as he is bound to appear in court and answer the state's charges." *Id.* at 279 (concurring opinion). In that case, however, although the petitioner alleged a prosecution unsupported by probable cause, he pressed only a due process and no Fourth Amendment claim, as both the lead opinion and Justice Ginsburg recognized. *See id.* at 271 (plurality opinion); *id.* at 277 & n.1 (Ginsburg, J. concurring). Accordingly, the parties did not brief, and the Court had no occasion to decide, whether Albright had a Fourth Amendment claim not barred by the applicable statute of limitations. Indeed, although Albright filed suit within two years

Wallace is a complete answer to petitioner's argument. As we explain above, in that case, this Court held that Wallace's claim accrued when he first appeared in court, not when he was released from custody. Even aside from the precedential force of *Wallace*, however, petitioner's argument is unavailing, for at least three reasons.

1. A Fourth Amendment Seizure Does Not Continue Throughout Pretrial Detention.

Petitioner's conception of a Fourth Amendment "seizure" continuing throughout pretrial detention is insupportable.

A "seizure" of a person, for purposes of the Fourth Amendment, involves the process of acquiring custody of an individual, not court-ordered pretrial detention of one previously taken into custody. *See, e.g.*, *Brendlin v. California*, 551 U.S. 249, 254 (2007) ("A person is seized by the police when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement" (emphasis, internal quotations and citations omitted)); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) ("From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.' To constitute an arrest, however – the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence – the mere grasping or application

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after the charges against him were dismissed, he sued more than two years after he had been arrested; and, for that reason, the plurality observed that he "may have missed the [applicable two-year] statute of limitations for any claim he had based on an unconstitutional search or seizure." *Id.* at 271 n.5.

of physical force with lawful authority was sufficient.").

Judicially-authorized pretrial detention, in contrast, has always been assessed under the Due Process Clause. *See, e.g.*, *Kingsley v. Henrickson*, 135 S. Ct. 2466, 2473-76 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979). Indeed, if pretrial detention were "a seizure subject to the reasonableness requirement of the Fourth Amendment," *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), there would be no need for the Eighth Amendment's Bail Clause and its admonition that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII, cl.1.

On this point, petitioner relies primarily on *Gerstein v. Pugh*, 420 U.S. 103 (1975), as do his amici, *e.g.*, U.S. Br. 11-12; Alschuler Br. 30; NACDL Br. 13, 27 *Gerstein*, however, held only that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. In this fashion, *Gerstein* identified a Fourth Amendment *prerequisite* to pretrial detention; it did not hold that the entire period of pretrial detention is a "seizure" within the meaning of that amendment.

Petitioner was searched and seized, allegedly unreasonably, when he was arrested. His Fourth Amendment claim accrued then.

2. An Arresting Officer's Seizure Ends When the Arrestee Appears in Court.

Even if pretrial detention is properly regarded as an ongoing seizure, that would have no effect on the point at which petitioner's claim against the arresting officers accrued. Their seizure of petitioner ended when he left their custody.

Under Illinois law, an arrestee must be brought to court "without unnecessary delay . and a charge shall be filed." 725 ILCS 5/109-1(a) (2014). At the initial appearance in court, the judge must admit the arrestee to bail as provided by applicable law. *Id.* § 109-1(b)(4). Accordingly, after an arrestee appears in court, his custodial status is determined by the court, not the arresting officers. Thus, once petitioner appeared in court and received a bail hearing, he was no longer in respondents' custody, and their seizure of him was at an end.

It therefore is quite wrong to say that respondents somehow seized petitioner throughout the course of his prosecution.

3. A Claim Accrues When a Defendant's Overt Act Injures a Plaintiff.

Even if respondents undertook some sort of ongoing seizure throughout the time that petitioner was in custody, that would not delay accrual of petitioner's Fourth Amendment claim.

Statutes of limitation "characteristically embody a 'policy of repose, designed to protect defendants.'" *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Burnet v. New York Central R. Co.*, 380 U.S. 424, 428 (1965)). It follows that conduct occurring outside the limitations period is "treat[ed] as lawful" once a litigant "fail[s] to file a timely charge " *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Accordingly, a plaintiff may not bring suit based on a defendant's overt act that caused him injury outside the limitations period, even if the defendant committed additional unlawful acts within the limitations period. *See, e.g.*, *Klehr v. A.O. Smith Co.*, 521 U.S. 179,

189 (1997) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."); *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.").

It is only when the defendant's conduct is illegal because it involves an ongoing pattern of misconduct extending into the limitations period that an alleged continuing violation delays accrual. *See, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) ("A hostile work environment claim is composed of a series of separate acts Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered "); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) ("[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." (footnote omitted)).

Petitioner alleged no pattern of misconduct extending into the limitations period. To the contrary, the arresting officers searched and seized petitioner on a single occasion, and, under *Wallace*, an attack on that arrest is now time-barred. Even if the arresting officers later provided false information to prosecutors

about petitioner's arrest, that would not have produced a fresh search or seizure in violation of the Fourth Amendment.[7]

In fact, the only conduct of any respondent alleged in the complaint and occurring after petitioner's arrest and appearance in court is Officer Gruber's testimony before the grand jury. That testimony, however, occurred outside the limitations period. It was also protected by the immunity from civil liability enjoyed by grand jury witnesses. *See Rehberg*, 132 S. Ct. at 1506-07 (holding that allegedly false grand jury testimony and activities "preparatory" to testimony are immunized).

Petitioner surely cannot extend the limitations period through the strange alchemy of combining a time-barred false-arrest claim with time-barred and immunized grand jury testimony. *Cf. Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989) ("[P]etitioners have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.").

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[7] This point discloses the problem with the position of the United States, which concedes that "the district court correctly dismissed as time-barred petitioner's allegations concerning his warrantless arrest," but nevertheless argues that petitioner's "claim for unlawful pretrial detention was timely, however, because it did not accrue until after the drug charge was dismissed " U.S. Br. 19 n.10. This submission improperly splits a single Fourth Amendment claim into two. The arresting officers allegedly conducted an unreasonable search and seizure of petitioner only once, outside the limitations period.

Petitioner's complaint alleged a discrete Fourth Amendment violation outside the limitations period. It is time-barred.

C. Powerful Policy Considerations Support a Rule of Prompt Accrual for Fourth Amendment Claims.

Our concern with the limitations period applicable to Fourth Amendment claims is rooted in our experience with these claims. Petitioner's submission would make it enormously difficult for local governments and their employees to have a fair chance to defend the claims that petitioner's submission makes viable.

Although, in his opening brief, petitioner never expressly takes a position on when his claim accrued, in the lower courts, he argued that he "filed his complaint within two years of the dismissal of the drug charge, so his malicious prosecution claim was timely." Pet. Br. 9. Perhaps petitioner's argument that "anyone who is arrested and put in jail is seized from arrest until release," *id.* at 22, means the Fourth Amendment claim he presses is available only to those who have been subject to pretrial detention. But, some amici go further, arguing that even those released prior to trial remain "seized" in some sense, and acquire the right to sue when they are no longer required to appear in court. *See* NACDL Br. 24-27.

Petitioner's submission also implies that even defendants who are convicted and sentenced to prison can bring Fourth Amendment claims upon release. After all, if a Fourth Amendment seizure continues as long as an individual is in custody, a "seizure" would presumably extend to post-conviction incarceration no less than pretrial detention. Some amici are explicit on this point, arguing that individuals who have been

convicted acquire the right to sue years later, when they are finally released. *See* Innocence Network Br. 27-30.

Moreover, the conception of a Fourth Amendment claim accruing upon release from custody suggests that even convicts who are never exonerated can emerge from prison and file decades-old Fourth Amendment claims. Although petitioner notes that "[m]alicious prosecution claims accrue when 'criminal proceedings have terminated in the plaintiff's favor,'" Pet. Br. 9 (quoting *Heck v. Humphrey*, 512 U.S. 477, 489 (1994)), it is far from clear that this favorable-termination rule is consistent with Fourth Amendment jurisprudence. It has long been settled that the Fourth Amendment's "protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald v. United States*, 335 U.S. 451, 453 (1948).

In *Heck*, for example, while holding that section 1983 plaintiffs may not bring suit when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," 512 U.S. at 487, the Court added that a Fourth Amendment claim "may lie even if the challenged search produced evidence that was introduced in the state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Id.* at 487 n.7

Beyond that, under petitioner's submission, section 1983 plaintiffs could presumably bring Fourth Amendment claims never litigated in the antecedent criminal case. Section 1983 contains no rule barring plaintiffs from bringing Fourth Amendment claims merely because they could have been made in an antecedent criminal prosecution, even if the plaintiff chose to

plead guilty in the prior criminal case. *See Haring v. Prosise*, 462 U.S. 306, 317-23 (1983).

Accordingly, the submissions of petitioner and his amici enable section 1983 plaintiffs to bring new Fourth Amendment claims many years after an allegedly wrongful search or seizure. *See, e.g.*, Alschuler Br. 9 (acknowledging pretrial detention can "be long" and detention after trial "is likely to be long"). Wallace, for example, was in custody for over nine years before he was released and then brought suit. *See* 549 U.S. at 386-87.

The delays that these submissions contemplate will make it enormously difficult to defend litigation. In our experience, jurors frequently credit plaintiffs' testimony that they remember their arrests vividly, but because arrests are a routine business for many officers, years later they often have no independent recollection of the events. Worse still, after long delays, officers often have retired, moved, or even passed away, and independent witnesses or physical and documentary evidence that could corroborate them often cannot be located.

It is the unfairness inherent in litigating stale claims that is central to statutes of limitation, which "are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabrelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Order of Railway Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). The position advanced by petitioner and his amici, however, is utterly at odds with the purpose of the section 1983's use of state-law limitations periods, which are employed because "[j]ust determinations of

fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

A person who believes he was arrested without probable cause has ample reason to press that claim as soon as the arrest occurs. Petitioner's submission, however, tolerates lengthy delays that could be enormously prejudicial. Unless defendants are given prompt notice, they may be unaware of the need to undertake an investigation and preserve evidence.

Petitioner's rule would be costly as well, forcing law-enforcement agencies to preserve evidence for decades, at taxpayers' expense, in case a Fourth Amendment claim someday emerges. Even then, faded memories will often necessitate handsome settlements.

Worse still, the truth-seeking process is prejudiced when litigation is premised on stale evidence. That is reason enough to reject petitioner's Fourth Amendment theory of "malicious prosecution."

II. A FOURTH AMENDMENT CLAIM IS NOT PROPERLY CHARACTERIZED AS AN ACTION FOR MALICIOUS PROSECUTION.

Petitioner argues that "[p]ermitting Fourth Amendment claims such as Manuel's to proceed would uphold the longstanding principle that victims of malicious prosecution are entitled to a damages remedy." Pet. Br 36. Some of his amici similarly invoke the common-law tort of malicious prosecution. *E.g.*, Alschuler Br. 10-14. Others, however, admit the difficulties in comparing a Fourth Amendment claim with this tort. *E.g.*, U.S. Br 24 n.15 (acknowledging that the two claims "are not a perfect fit").

Analogies between section 1983 and common-law tort claims are often perilous. As this Court has observed, "§ 1983 differs in important ways from pre-existing torts." *Rehberg*, 132 S. Ct. at 1504. Indeed, section 1983 "ha[s] no precise counterpart in state law"; and, therefore, "[i]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson*, 471 U.S. at 272 (internal quotations and citation omitted).

Still, the common law can be instructive in section 1983 litigation because "'Congress intended [§ 1983] to be construed in the light of common-law principles,'" *Rehberg*, 132 S. Ct. at 1502 (second brackets in original) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

For example, in *Heck*, invoking "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," 512 U.S. at 486, the Court held that when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence the complaint must be dismissed," *id.* at 487, reasoning that "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because it permits damages for confinement imposed pursuant to legal process." *Id.* at 484. The Court therefore held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90 (footnote omitted).[8]

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[8] This holding does petitioner no good because he was never convicted. *Heck* does not delay accrual of claims prior to the point

Wallace, however, makes clear that a plaintiff cannot avoid the statute of limitations on a false-arrest claim merely by seeking damages for ensuing confinement pursuant to legal process. As we explain in Part I.A above, Wallace sought such damages, yet this Court held that his claim accrued when left the arresting officers' custody, not when he was released. If Wallace could extend the limitations period by seeking damages for confinement pursuant to legal process, the Court explained, "the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the hands of the party seeking relief." 549 U.S. at 391.

That holding forecloses petitioner's effort to delay accrual by announcing that he is interested in damages incurred while in custody pursuant to legal process. Petitioner's claim that he was arrested without probable cause accrued when he appeared in court, regardless of the damages he seeks as a consequence of that arrest.

Even aside from *Wallace*, petitioner's reliance on the common law of malicious prosecution is unavailing because of the manifold differences between Fourth Amendment and malicious-prosecution claims.

The Restatement of Torts identifies the elements of the tort of malicious prosecution:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:

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at which a criminal-defendant-turned-section-1983-plaintiff has been convicted. *See Wallace*, 549 U.S. at 392-94.

> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

Restatement (Second) of Torts § 653 (1977). These elements have changed little since the enactment of section 1983; in that era as well, malicious prosecution required proof that the defendant instituted a prosecution maliciously and without probable cause, which was terminated favorably to the accused. *See, e.g.*, Joel Prentiss Bishop, Commentaries on the Non-Contract Law §§ 221-26 (1889); 1 Francis Hilliard, The Law of Torts 416-18, 428-58 (3d ed. rev. 1866); John Townshend, A Treatise on the Wrong Called Slander and Libel §§ 420-21 ((3d ed. 1877).

As we now explain, petitioner's claim fundamentally differs from the common-law tort of malicious prosecution.

A. Fourth Amendment Claims Differ Fundamentally from a Claim for Malicious Prosecution.

The most obvious difference between a Fourth Amendment claim and malicious prosecution, as we explain above, is that malicious prosecution does not require, as one of its elements, that the plaintiff have been searched or seized. That alone should make it clear that the common law of malicious prosecution offers little useful guidance here. Beyond that, there are additional and quite fundamental differences between malicious prosecution and Fourth Amendment claims.

1. Fourth Amendment Claims Do Not Turn on the Outcome of an Antecedent Case.

Unlike malicious-prosecution claims, Fourth Amendment claims do not require a favorable outcome in antecedent litigation.

As we explain above, one element of malicious prosecution is that the antecedent prosecution terminated favorably to the criminal-defendant-turned-civil-plaintiff. A Fourth Amendment claim, in contrast, is not dependent on the outcome of an antecedent criminal prosecution. Instead, "[t]he wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search or seizure itself " *Leon*, 468 U.S. at 906 (internal quotation and citation omitted).

Thus, persons victimized by unreasonable search and seizure but never criminally charged can bring Fourth Amendment claims under section 1983 without need to resort to state-court litigation. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 169-87 (1961), *overruled in part on other grounds by Monell v. Department of Social Services of N.Y.*, 436 U.S. 658 (1978).

Conversely, even those who are convicted on the basis of evidence obtained through an allegedly unreasonable search or seizure can bring suit despite the conviction. In *Heck*, for example, as we explain in Part I.C above, the Court wrote that "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." 512 U.S. at 487 n.7.

Moreover, even those who plead guilty can sue to seek redress for an allegedly unreasonable search or seizure, even if it was the basis for the charge to which the guilty plea was entered in state court, as long as applicable state law does not treat the guilty plea as precluding subsequent civil litigation. *See Haring*, 462 U.S. at 317-23. Indeed, in that case, the Court rejected a rule that would have required a section 1983 plaintiff to "prevail in state court 'in order to [preserve] the mere possibility" of later bringing a § 1983 claim in federal court.'" *Id.* at 322 (quoting *Brown v. Felson*, 442 U.S. 127, 135 (1979) (brackets in original)).

As *Wallace* explains, one, like petitioner, allegedly arrested without probable cause, can bring a Fourth Amendment claim immediately upon arrest, without need to await the outcome of related criminal litigation. *See* 549 U.S. at 391, 397 Accordingly, the Fourth Amendment claim petitioner advances fundamentally differs from a malicious-prosecution claim, which requires proof of a favorable outcome in an antecedent prosecution.

2. The Fourth Amendment Does Not Address the Decision to Prosecute.

Although the tort of malicious prosecution imposes a requirement of probable cause to prosecute, the Fourth Amendment does not address the decision to prosecute.

As we explain above, the Fourth Amendment addresses unreasonable searches and seizures," not unwarranted or malicious prosecutions. Not only is the legal wrong addressed by the Fourth Amendment fully accomplished by the unreasonable search or seizure itself, but even the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth

Amendment wrong.'" *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354 (brackets in original)).

Thus, the Fourth Amendment does not address the decision to prosecute; indeed, in *Gerstein*, the Court rejected the view that the Fourth Amendment entitles "the accused to judicial oversight or review of the decision to prosecute." *Id.* at 119. *See also Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) ("The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard.") (citations omitted).

A Fourth Amendment claim is properly directed at a search or seizure, not the decision to prosecute. Petitioner's reliance on that tort is unavailing.

3. Fourth Amendment Claims Do Not Turn on Proof of Malice.

Although the common-law tort of malicious prosecution required proof of malice, a Fourth Amendment claim does not.

As we explain above, in addition to the absence of probable cause, a malicious prosecution claim requires proof of malice; that is, bringing the case "primarily for a purpose other than that of bringing an offender to justice " Restatement (Second) of Torts § 653(a) (1977). Leading commentators in the era of section 1983's enactment, while acknowledging that malice may be inferred from an absence of probable cause, nevertheless stressed that malice was an independent element of the tort requiring a separate finding of improper motive. *See, e.g.*, Melville M. Bigelow, Leading Cases on the Law of Torts 203-04 (1875); Bishop, *supra* §§ 231-35; Thomas M. Cooley, A

Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 185 (1880); Hilliard, *supra* at 446-48; Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process 236-49 (1892).

Fourth Amendment claims, in contrast, are judged by an objective test in which the motive of the investigator is irrelevant. *See, e.g.*, *Kentucky v. King*, 563 U.S. 452, 463-64 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006).

To be sure, as petitioner notes, to invalidate a search warrant, there must be proof of material misstatements or omissions made at least recklessly. Pet. Br. 17-18 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). This case, however, involves no effort to invalidate a warrant, and even a recklessness standard stops well short of the common-law requirement of malice. *Cf.* NACDL Br. 22 ("[N]othing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis." (footnote omitted)).

Thus, petitioner's Fourth Amendment claim does not require proof of malice. For that reason, it fundamentally differs from a common-law claim of malicious prosecution.

B. An Arresting Officer Is Not Akin to a Complaining Witness Amenable to Suit at Common Law for Malicious Prosecution.

A police officer making an arrest is not fairly analogous to a private party amenable at common law to liability for malicious prosecution.

The Restatement of Torts, as we note above, explains that liability for malicious prosecution can be imposed on "[a] *private* person who initiates or procures the institution of criminal proceedings against another." Restatement (Second) of Torts § 653 (1977) (emphasis supplied). Similarly, at the time of section 1983's enactment, "'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution " *Rehberg*, 132 S. Ct. at 1503 (quoting *Malley*, 475 U.S. at 340). Moreover, "the term 'complaining witness' was used to refer to a party who procured an arrest and initiated a criminal prosecution." *Id.* at 1507 (citation omitted).

It is no accident that the Restatement of Torts refers only to the liability of private parties for malicious prosecution. When the common-law tort of malicious prosecution developed, nothing resembling modern police departments with investigative responsibilities existed.

In England, until roughly the time of the American Revolution, the only public official engaged in law enforcement was the constable, an official charged with executing warrants and who appointed beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night. *See* Elaine A. Reynolds, Before the Bobbies: The Night Watch and Police Reform in Metropolitan London, 1720-1830, at 7-44 (1998). This system emerged in the colonies and remained in place in the framing era, with the duties of public officials engaged in law enforcement largely confined to the execution of warrants and responding to breaches of the peace. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 28-29, 68 (1993).

Not until the mid-nineteenth century did large cities begin establishing police forces. *See, e.g.*, David R. Johnson, Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887, at 12-40 (1979); Thomas A. Repetto, The Blue Parade 2-23 (1978); James F. Richardson, Urban Police in the United States 6-15, 19-32 (1974). Even so, by the time of the Civil Rights Act, policing was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more." Friedman, *supra* at 149.

Public prosecutors were also a rarity in this period. Prosecution by private parties was the predominant method at common law and was only gradually displaced by public prosecution during the nineteenth century. *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 Encyclopedia of Crime and Justice 1286 (Sanford H. Kadish et al. eds., 1983).

Nevertheless, "because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Leg. Hist. 43, 43 (1995) (footnote omitted). Thus, "when § 1983 was enacted there was generally no such thing as the modern public prosecutor." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). Instead, "it was common for criminal cases to be prosecuted by private parties." *Rehberg*, 132 S. Ct. at 1503.

It should therefore be unsurprising that virtually all of the cases describing the tort of malicious prosecution prior to 1871 considered the liability of private

individuals for initiating a prosecution rather than the potential liability of public officials such as prosecutors or investigators. *See, e.g.*, Herbert Stephen, The Law Relating to Actions for Malicious Prosecution 16-25 (Horace M. Rumsey ed. 1889); Townshend, *supra* at 432.

In the contemporary criminal justice system, in contrast, "it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury " *Rehberg*, 132 S. Ct. at 1508.[9] Prosecutors, in turn, are immune from damages liability "when initiating a prosecution " *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

The common-law concept of a complaining witness legally responsible for the institution of a prosecution made sense in a system of private prosecution; without tort liability, private parties would not be accountable for wrongful prosecutions they bring against others, potentially to advance their pecuniary or other personal interests. That rationale, however, has little application to the contemporary system of public prosecution.

Police officers are public officials with investigative, not prosecutorial responsibilities. Moreover, in contrast to private parties with an incentive to maximize profits or otherwise pursue their own interests, "government employees typically act within a *different* system." *Richardson v. McKnight*, 521 U.S. 399, 410 (1997).

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[9] That is the case under Illinois law. It is the responsibility of the State's Attorney, not the police, to prosecute violations of state law. *See* 55 ILCS 5/3-9005(a)(1) (2014). It is also the responsibility of the State's Attorney to present evidence to the grand jury. *See* 725 ILCS 5/112-4 (2014).

In particular, unlike private parties, police officers, the departments that employ them, and the public prosecutors who utilize them as witnesses, are subject to political accountability for wrongful prosecutions: "There is no conviction-of-the innocent lobby in our politics; police and prosecutors who prosecute or convict the innocent face political accountability once an exoneration occurs." Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 Chi.-Kent L. Rev. 127, 155 (2010) (footnote omitted). Thus, arresting officers are not fairly analogous to complaining witnesses at common law. *Cf. Rehberg*, 132 S. Ct. at 1507 ("[A] law enforcement officer who testifies before a grand jury is not at all comparable to a 'complaining witness.'").

Officers who make arrests without probable cause are properly held liable under the Fourth Amendment, if they are timely sued. Using section 1983 to treat police as the common law treated private individuals who acted as complaining witnesses, however, is not a faithful application of common-law principles.

C. Damages Attributable to a Criminal Prosecution Are Not Available on a Fourth Amendment Claim.

Although malicious prosecution "permits damages for confinement imposed pursuant to legal process," *Heck*, 512 U.S. at 484, it is far from clear that the same rule applies to a Fourth Amendment claim. Because the Fourth Amendment addresses search and seizure, not unwarranted prosecutions, damages associated with decisions to press charges are not recoverable under section 1983.

As the Court has explained, "the elements and prerequisites for recovery of damages appropriate to

compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Carey v. Piphus*, 435 U.S. 247, 264-65 (1977). Instead, recoverable damages are to be determined "with reference to the nature of the interests protected by the particular constitutional right in question." *Id.* at 265.

As its text makes plain, the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his person or property." *Horton v. California*, 496 U.S. 128, 133 (1990). *Accord, e.g., Soldal v. Cook County*, 506 U.S. 56, 66 (1992). The decision of a prosecutor to bring charges against an arrestee, however, does not enable arresting officers to further invade the arrestee's privacy or liberty. Instead, it initiates litigation that facilitates an authoritative determination of the defendant's Fourth Amendment rights.

In *Gerstein*, as we note above, the Court rejected the view that the Fourth Amendment entitles "the accused to judicial oversight or review of the decision to prosecute." 420 U.S. at 119. Thus, as Judge Posner put it, Fourth Amendment damages do not include those attributable to prosecution because "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003), *overruled in part on other grounds by Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom. Wallace v. Kato*, 549 U.S. 384 (2007).

Other constitutional requirements protect an accused against unwarranted charges, such as the right to counsel, which attaches at an arrestee's initial appearance in court, *see Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008), and the rights to a speedy, public, and fair trial, before an impartial jury. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-81 (1979). Damages flowing from a prosecution that infringes these constitutional rules governing criminal litigation may well be available under section 1983.

For example, the right to a fair trial includes a prosecutor's obligation under the Due Process Clause to learn of and disclose to the defense material exculpatory information known to police and other investigators. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This allocation of responsibility makes good sense; police need not be lawyers, and prosecutors are in a far better position to determine if information is exculpatory and subject to disclosure than police. Still, if police take steps to obstruct prosecutors in discharging this duty, they may be liable in damages for a wrongful prosecution or conviction.[10]

Beyond that, perhaps a failure to timely investigate an arrestee's claim of innocence might violate due process. *Cf. Baker*, 443 U.S. at 145 ("We may even assume mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of

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[10] For cases embracing a rule along these lines, see, for example, *Burke v. McDonald*, 572 F.3d 51, 58 (1st Cir. 2009); *Dominguez v. Hendley*, 545 F.3d 585, 589–90 (7th Cir. 2008); and *Villasana v. Wilhoite*, 368 F.3d 976, 980 (8th Cir. 2004).

time deprive the accused of 'liberty without due process of law.'").

And, perhaps due process requires some civil remedy for an alleged malicious prosecution, *see Albright*, 510 U.S. at 283-86 (Kennedy, J., concurring in the judgment), although, when the prosecution is allegedly a consequence of an arrest without probable cause, the ability of the arrestee to bring a timely Fourth Amendment claim likely provides the process that is constitutionally due. *Cf. Gerstein*, 420 U.S. at 126 n.27 ("The Fourth Amendment has always been thought to define the 'process that is due' for seizures of persons and property in criminal cases, including the detention of suspects pending trial.").

Here, only a Fourth Amendment claim is before the Court. Perhaps the prosecutor was imprudent for pressing charges against petitioner on the basis of the arresting officers' accounts, rather than waiting for laboratory test results, but the prosecutor's decision was his own – not that of the arresting officers – and that decision neither violated the Fourth Amendment nor implicated the interests protected by that amendment.

For his part, petitioner argues that damages liability for wrongful prosecutions will deter police misconduct. Pet. Br. 35. Indeed, damages are available against police for wrongful arrests, if plaintiffs timely sue. Charging decisions, in contrast, are made by prosecutors. Treating police officers as if they were prosecutors "is anomalous," and even "raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

Beyond that, the incentive effects of liability are blunted because police officers are usually indemnified for their legal costs. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912-37 (2014). The ubiquity of indemnification is unsurprising: "[I]ndemnification is the most efficient way for an employer to offer the level of compensation that will minimize the risk of over-deterrence." Rosenthal, *supra* at 131 (footnote omitted). To be sure, local governments have reason to encourage employees to avoid incurring liabilities that for which they must be indemnified. Nevertheless, local governments must also respond to political and not merely economic incentives, and they "likely perceive far more political pressure to make cases than to limit liability"; thus, petitioner's view of the incentive effects of liability "considerably oversimplifies the crosscutting pressures faced by those in law enforcement." *Id.* at 153 (footnote omitted).

Accordingly, damages associated with a criminal prosecution are not recoverable under a constitutional provision that addresses "search and seizure," not malicious prosecution.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has approximately 9000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the American Bar Association's House of Delegates.

NACDL is dedicated to advancing the just, efficient, and proper administration of justice, including the administration of federal criminal law. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to *amicus* briefs; the consents are reflected on the Court's docket.

NACDL has an interest in this case because it involves the interpretation and application of the Fourth Amendment right to be free from unreasonable seizures. NACDL has a strong interest in ensuring that criminal defendants are not wrongfully prosecuted without probable cause. Providing a civil remedy under 42 U.S.C. § 1983 for the unreasonable deprivations of liberty that result from groundless prosecutions would deter such wrongful prosecutions and help make criminal defendants whole when they occur.

SUMMARY OF ARGUMENT

A prolonged seizure without probable cause violates the Fourth Amendment. The mere fact that the seizure was conducted pursuant to legal process, such as an arrest warrant or indictment, does not obviate the constitutional violation. Because 42 U.S.C. § 1983's plain language creates a cause of action for "the deprivation of *any* rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983 (emphasis added), this Court should recognize the viability of petitioner's claim here, which seeks redress for his weeks-long pretrial detention without probable cause.

By following the well-trod path of "nearly every * * * Circuit" in holding that "malicious prosecution is actionable under the Fourth Amendment," *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (D.C. Cir. 2007), this Court would break no new ground, nor would such a holding impose unreasonable burdens on law enforcement officials. Lower courts have permitted plaintiffs to pursue malicious prosecution claims under § 1983 for nearly half a century. See, *e.g.*,

Beauregard v. *Wingard*, 230 F Supp. 167, 185 (S.D. Cal. 1964). By the time this Court decided *Albright* v. *Oliver*, 510 U.S. 266 (1994), *every* circuit to address the issue had recognized malicious prosecution as a constitutional claim actionable under § 1983 in one form or another.

Although *Albright* rejected the theory that prosecution without probable cause violates an individual's *substantive due process rights*, seven Justices (five of whom concurred in the judgment) recognized the potential viability of Fourth Amendment challenges to groundless prosecutions. See 510 U.S. at 271 (plurality opinion); see also *id.* at 288-291 (Souter, J., concurring in judgment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Thus, *Albright* "left undisturbed" lower courts' "longstanding recognition of a Fourth Amendment right to be free from malicious prosecution." *Kerr* v. *Lyford*, 171 F.3d 330, 339 (5th Cir. 1999), *abrogated on other grounds by Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003). This Court should correct the outlier position staked out by the Seventh Circuit and clarify that, as *ten* circuits have held post-*Albright*, a pretrial seizure without probable cause violates the Fourth Amendment and can give rise to a § 1983 claim, regardless of whether the seizure is conducted pursuant to legal process. Recognizing such claims will deter government agents from abusing their authority and the judicial process and ensure the availability of a federal remedy for constitutional violations.

Decades of experience from the vast majority of regional courts of appeals confirm that recognizing a Fourth Amendment-based malicious prosecution claim does not chill legitimate law enforcement con-

duct. To succeed on a § 1983 malicious prosecution claim, the plaintiff must show that there was no probable cause for his continued pretrial seizure. Law enforcement officers, surely educated in the probable cause standard, have a ready guide for steering clear of actions that may expose them to potential § 1983 liability. Officers are further insulated by the doctrine of qualified immunity. Qualified-immunity determinations are immediately appealable, ensuring that officers are not required to face the burdens of litigation without resolution of "the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Moreover, 42 U.S.C. § 1988 discourages plaintiffs from filing frivolous claims by making attorney's fees available for prevailing defendants. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978).

By emphasizing that claims such as petitioner's are firmly rooted in the text of the Fourth Amendment, this Court can also resolve a minor, technical disagreement among lower courts regarding whether subjective "malice" is an element of § 1983 claims challenging seizures pursuant to legal process. Because Fourth Amendment inquiries are generally conducted under an objective standard, § 1983 plaintiffs should not be required to prove a defendant's subjective malice.

Although not necessary to resolve this case, this Court should also adopt the broad definition of seizure embraced by well-reasoned decisions of lower courts. That definition includes not only physical detention, but also significant pretrial restraints of liberty such as travel restrictions, mandated court ap-

pearances, and obligations to regularly contact pretrial services officers. Correcting the crabbed definition of "seizure" adopted by some lower courts is necessary to give proper scope to the Fourth Amendment, which this Court has recognized requires a judicial determination of probable cause for "*any* significant pretrial restraint of liberty." *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1975) (emphasis added).

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS UNREASONABLE PRETRIAL SEIZURES, EVEN AFTER INITIATION OF LEGAL PROCESS

A. Courts Have Long Recognized That Section 1983 Provides A Remedy For Pretrial Seizures After Initiation Of Legal Process

In *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court recognized that in enacting 42 U.S.C. § 1983, "Congress * * * meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172. The *Monroe* Court, construing the statutory phrase "under color of state law," made clear that § 1983 provides a remedy for "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," whether the official acts "by reason of prejudice, passion, neglect, intolerance or otherwise." *Id.* at 180, 184 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)). Soon after the Court's watershed decision in *Monroe*, courts began allowing individuals subject to baseless prosecution to seek redress under § 1983. See, *e.g.*, *Sullivan* v. *Choquette*, 420 F.2d 674,

675-676 (1st Cir. 1969); *Rue* v. *Snyder*, 249 F. Supp. 740, 743 (E.D. Tenn. 1966); *Beauregard* v. *Wingard*, 230 F. Supp. 167, 185 (S.D. Cal. 1964).

In the early days after *Monroe*, courts did not distinguish harms stemming from arrest, imprisonment, and prosecution; *all* groundless pretrial deprivations of liberty were considered wrongful—and actionable. From the very beginning, courts viewed "prosecut[ion] [of an individual] under circumstances not warranting his prosecution" as an injury every bit as deserving of redress as "arres[t] under circumstances not warranting * * * arrest, [and] imprison[ment] * * * under circumstances not warranting * * * imprisonment." *Rue*, 249 F. Supp. at 742. Thus, when a police officer "sought to use the power of arrest to win a motorists' quarrel" with another driver "in which the [officer] was not altogether blameless," the driver was permitted to bring suit under § 1983. *Id.* at 742-743. So, too, for "a candidate for the office of City Councilman" who was arrested, booked, and tried in an effort to "bring him into disgrace in his community" because "during the political campaign[, he] severely criticized the Chief of Police." *Beauregard*, 230 F Supp. at 170-171. After his acquittal, upon a showing that the "the acts of the [police] were without cause," the court held that the candidate could pursue claims under § 1983 based on both his initial arrest and the subsequent prosecution. *Id.* at 171 & n.3, 185.

As the law continued to develop, courts increasingly recognized the importance of § 1983 as a necessary tool to provide redress, not simply for arrest and imprisonment, but also for the ensuing prosecution. As the Fourth Circuit explained nearly three decades

ago, the Constitution protects against groundless prosecution because "[l]ike an arrest, a prosecution is 'a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.'" *Goodwin* v. *Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (quoting *United States* v. *Marion*, 404 U.S. 307, 320 (1971)). Thus, the Fourth Circuit held that, even where the defendant had been released on bond before trial and thus not incarcerated, that was "not decisive in determining if he has suffered an abridgement of constitutional rights. Being subjected to a prosecution while an officer withheld exculpatory evidence from the prosecutor while urging that the prosecution should go forward can work a constitutional deprivation." *Ibid.*; see also *Strength* v. *Hubert*, 854 F.2d 421, 426 (11th Cir. 1988) ("[A]ny of the pretestimonial acts that might have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action."); *Singleton* v. *City of New York*, 632 F.2d 185, 195 (2d Cir. 1980) ("The essence of the § 1983 claim [for malicious prosecution] is the alleged groundless prosecution, without which there would not be any basis for the claim.").

Decades of experience confirm the value of recognizing a cause of action for unsupported prosecution. Most obviously, courts have recognized the need for § 1983 to deter misconduct and compensate individuals for grossly incompetent, and sometimes malicious, police work resulting in baseless prosecutions. *Golino* v. *New Haven*, 950 F.2d 864 (2d Cir. 1991), is

emblematic of the type of misconduct § 1983 actions have addressed. There, the record indicated that police withheld that eyewitness descriptions foreclosed Golino as a suspect, that fingerprints left by the killer did not match Golino's prints, and that one eyewitness had positively identified the victim's boyfriend as the killer. *Id.* at 871-872. Years after the prosecution began, the charges against Golino were dismissed when a court-ordered blood test confirmed that Golino was not the killer. *Id.* at 866; see also *Singleton*, 632 F.2d at 188 (police falsely charged a robbery suspect with felonious assault and resisting arrest after they became aware that he was not the perpetrator); *Morrison* v. *Jones*, 551 F.2d 939, 940-941 (4th Cir. 1977) (officer arrested and charged bicyclist with "assault with intent to maim, disable, or kill the officer" after the officer injured himself while trying to stop the bicyclist from riding in a bus lane). Without a cause of action under § 1983 for baseless prosecutions, individuals would have no avenue to seek redress for unconstitutional deprivations of liberty that continue after formal process is initiated—and law enforcement officials would have little incentive to refrain from prosecuting such cases.

The prospect of malicious-prosecution liability likewise deters officers who can establish "probable cause as to a lesser offense [from wrongfully] tack[ing] on more serious, unfounded charges which would support a high bail or lengthy detention." *Posr* v. *Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); see also *Janetka* v. *Dabe*, 892 F.2d 187, 189 (2d Cir. 1989) ("Allowing police officers to add unwarranted misdemeanor charges to valid violation charges may force

an accused to go to trial on the misdemeanor when he otherwise would plead to the violation.").

By the time this Court decided *Albright* v. *Oliver*, 510 U.S. 266 (1994), *every* circuit to address the issue had recognized malicious prosecution as a constitutional claim actionable under § 1983 in one form or another.[2] Although some courts of appeals required a showing of governmental action "so egregious" as to "shock the conscience" in order to recover under § 1983, *e.g.*, *Morales* v. *Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990), others focused on what this Court found compelling in *Albright*: the familiar Fourth Amendment inquiry into the presence or absence of probable cause, and the bedrock right not to be "prosecut[ed] * * * 'in bad faith'—i.e. without probable cause." *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 258 (5th Cir. 1984) ("[T]here is a federal right to be free from bad faith prosecutions." (quoting *Shaw* v. *Garrison*, 467 F.2d 113, 120 (5th Cir. 1972))); see also, *e.g.*, *Strength*, 854 F.2d at 425-426; *Losch* v. *Borough of Parkesburg*, 736 F.2d 903, 907-908 (3d Cir. 1984) ("It is clear that the filing of charges without probable cause and for reasons of personal animosity is actionable under § 1983.").

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[2] See *Morales* v. *Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Raysor* v. *Port Auth.*, 768 F.2d 34, 39 (2d Cir. 1985); *Losch* v. *Borough of Parkesburg*, 736 F.2d 903, 907-908 (3d Cir. 1984); *Goodwin* v. *Metts*, 885 F.2d 157, 163 (4th Cir. 1989); *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 260 (5th Cir. 1984); *Vasquez* v. *City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985); *Inada* v. *Sullivan*, 523 F.2d 485, 486-488 (7th Cir. 1975); *Kohl* v. *Casson*, 5 F.3d 1141, 1145 (8th Cir. 1993); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 561-562 (9th Cir. 1987); *Robinson* v. *Maruffi*, 895 F.2d 649, 653-655 (10th Cir. 1990); *Strength* v. *Hubert*, 854 F.2d 421, 425-426 (11th Cir. 1988).

B. In The Decades Since *Albright*, The Vast Majority Of Circuit Courts Have Concluded That Unreasonable Pretrial Seizures After Initation Of Legal Process Violate The Fourth Amendment

In *Albright*, a majority of this Court concluded that prosecution without probable cause does not violate an individual's substantive due process rights. 510 U.S. at 271. But *Albright* did not alter the prevailing view of the basic rights afforded under the Fourth Amendment. See *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 115 (2d Cir. 1995). Indeed, seven Justices in *Albright* recognized the potential viability of Fourth Amendment-based malicious prosecution claims. See 510 U.S. at 271 (plurality opinion); see also *id.* at 288-291 (Souter, J., concurring in judgment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Thus, after *Albright*, courts continued to recognize that law enforcement officials have a duty "to refrain from engaging in acts which continue[] a person's detention without probable cause," *Gregory* v. *City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006), explaining that *Albright* "left undisturbed" the courts' "longstanding recognition of a Fourth Amendment right to be free from malicious prosecution," *Kerr* v. *Lyford*, 171 F.3d 330, 339 (5th Cir. 1999), *abrogated on other grounds by Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003). As a result, in the years since *Albright*, "nearly every * * * Circuit has held that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause." *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (D.C. Cir. 2007); accord *Hernandez-*

Cuevas v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) ("[E]ach of the * * * Courts of Appeals to directly address in the years since *Albright* whether the Fourth Amendment provides protection against pretrial detention without probable cause has concluded that it does.").

Shortly after *Albright*, virtually every court to consider the issue concluded that plaintiffs may challenge pretrial restraints on liberty under the Fourth Amendment.[3] Thus while "*Albright* implies that prosecution without probable cause is not, in and of itself, a constitutional tort," the "deprivation of liberty accompanying the prosecution" may serve as a "constitutional violation" for purposes of a § 1983 claim. *Gallo* v. *City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998).

Today, *ten* circuit courts have held that pretrial restraints without probable cause violate the Fourth Amendment.[4] Though sometimes styled as "mali-

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[3] See *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 114-115 (2d Cir. 1995); *Hilfirty* v. *Shipman*, 91 F.3d 573, 575, 577 (3d Cir. 1996); *Gallo* v. *City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998); *Brooks* v. *City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996); *Eugene* v. *Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303-1304 (5th Cir. 1995); *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999); *Poppell* v. *City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998); *Taylor* v. *Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *Whiting* v. *Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996).

[4] See *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 115-116 (2d Cir. 1995); *Gallo* v. *City of Phila.*, 161 F.3d 217, 224-225 (3d Cir. 1998); *Lambert* v. *Williams*, 223 F.3d 257, 262 (4th Cir. 2000); *Castellano* v. *Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003); *Gregory* v. *City of Louisville*, 444 F.3d 725, 748-749 (6th Cir. 2006); *Galbraith* v. *Cty. of Santa Clara*, 307 F.3d 1119, 1127

cious prosecution" claims, courts recognize that such actions simply seek redress for "continued detention without probable cause." *Gregory*, 444 F.3d at 749. Accordingly, the "malicious prosecution" label serves as a "shorthand way of describing" a quintessential "section 1983 claim: the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Whiting* v. *Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). Even the Seventh Circuit—an outlier nationally—permits such claims under § 1983 where state law remedies are inadequate. See *Parish* v. *City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009).

To prevail on a malicious prosecution claim under the Fourth Amendment, a plaintiff must show "some deprivation of liberty consistent with the concept of 'seizure.'" *Singer*, 63 F.3d at 116. Further, since malicious prosecution implies an abuse of judicial process, "a plaintiff pursuing such a claim under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Murphy* v. *Lynn*, 118 F.3d 938, 944 (2d Cir. 1997); accord *Gallo*, 161 F.3d at 222 ("Gallo must show that he suffered a seizure as a consequence of a legal proceeding."); *Sykes* v. *Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) (malicious prosecution "remedies detention accompanied not by absence of legal process, but by *wrongful institution* of legal process").

(9th Cir. 2002); *Taylor* v. *Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *Whiting* v. *Traylor*, 85 F.3d 581, 584 (11th Cir. 1996); *Pitt* v. *District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007).

Many circuits have recognized that the "deprivations of liberty" actionable under § 1983 are not limited to traditional custodial seizures. For example, the Third Circuit has observed that, while pretrial restraints such as the obligation "to go to court and answer * * * charges" may not have "the feel of a seizure because [they are] effected by authority of the court, not by the immediate threat of physical force[,] [f]orce * * * lies behind the court's commands as it lies behind the policeman's 'Stop.'" *Gallo*, 161 F.3d at 223.

These observations are consistent with this Court's decision in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). There, the Court recognized that liberty deprivations regulated by the Fourth Amendment are not limited to physical detention, holding that "pretrial release * * * accompanied by burdensome conditions that effect a significant restraint on liberty * * * requires a judicial determination of probable cause." *Id.* at 114. *Terry* v. *Ohio*, 392 U.S. 1 (1968), likewise demonstrates that seizures can be of different intensities. While an arrest is the most common type of seizure, even a brief investigative stop can constitute a Fourth Amendment seizure. *Id.* at 16-18. Courts have relied on this reasoning to conclude that restrictions on travel, as well as mandatory attendance at court hearings, are restraints on liberty that fall within the ambit of the Fourth Amendment. See *Gallo*, 161 F.3d at 223; accord *Murphy*, 118 F.3d at 946.

In the years since *Albright*, courts have underscored the importance of malicious prosecution claims in deterring and remedying "misconduct in the criminal context" by focusing in on "the abuse of the judicial process by government agents." *Gallo*, 161 F.3d

at 225. The Federal Reporter is replete with instances of unreasonable action by police officers and prosecutors, from "deliberate attempt[s] to ensure the prosecution and conviction of an innocent man," *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1300 (10th Cir. 2004), to the initiation of criminal proceedings "despite overwhelming evidence of * * * innocence," *Pitt*, 491 F.3d at 498, and general "perversion of proper legal procedures," *Singer*, 63 F.3d at 117. As the Third Circuit noted, "[e]xcept when an innocent defendant is executed, we hardly can conceive of a worse miscarriage of justice." *Halsey* v. *Pfeiffer*, 750 F.3d 273, 278 (3d Cir. 2014). It is "fundamental to our American system of justice" that prosecutors and police officers are "prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Hernandez-Cuevas*, 723 F.3d at 100.

The Fourth Amendment's protection against pretrial restraints without probable cause is "one constitutional source of this 'self-evident' prohibition against manufactured evidence." *Ibid.* Recognizing malicious prosecution claims under the Fourth Amendment enables citizens to protect their constitutional rights and prevent abuse of the judicial process. The "constitutionally secured right of an accused in a criminal case" to be free from restraint unsupported by probable cause "was not seeded in the common law of tort where duties are the product of judicial choice," but is instead firmly rooted in the Fourth Amendment's text. *Castellano*, 352 F.3d at 958.

II. DECADES OF EXPERIENCE CONFIRM THAT RECOGNIZING MALICIOUS PROSECUTION CLAIMS BASED ON THE FOURTH AMENDMENT DOES NOT CHILL LEGITIMATE LAW ENFORCEMENT CONDUCT

A. The Existence Of Probable Cause Precludes Liability

In bringing a Fourth Amendment malicious prosecution claim, the plaintiff bears the burden of demonstrating that there was no probable cause for his continued pretrial detention. It is axiomatic that a seizure violates the Fourth Amendment only if the government lacked probable cause.[5] Therefore, "[t]he absence of probable cause is a necessary element of § 1983 false arrest and malicious prosecution claims" brought under the Fourth Amendment. *Yousefian* v. *City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015).

Probable cause, as the name suggests, "deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois* v. *Gates*, 462 U.S. 213, 231

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[5] In most circumstances, probable cause is a requirement for a reasonable seizure. See 2 Wayne R. LaFave, *Search and Seizure* § 3.1(a) (5th ed. 2015). A lesser showing is permissible only in a narrow range of circumstances. See, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 486 U.S. 444, 447 (1990) (sobriety checkpoints); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341 (1985) (searches of students by public school administrators); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (fixed border patrol checkpoints); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968) (brief investigative stops); *Camara* v. *Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 538 (1967) ("special needs" search of regulated party pursuant to municipal housing codes).

(1983) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)). Courts have recognized that this standard, which is based on the "nontechnical, common-sense judgments of laymen," gives appropriate guidance to law enforcement officials in determining when seizure is permissible. *Id.* at 235-236. Because this familiar standard is at the root of malicious prosecution claims, law enforcement officials have a ready guide for steering clear of actions that may expose them to § 1983 liability.

This standard also helps filter out questionable Fourth Amendment claims brought by § 1983 plaintiffs. Substantively, such plaintiffs must generally establish a lack of probable cause in the face of a neutral magistrate's conclusion that probable cause *did* exist, or a grand jury's indictment predicated on its existence. See, *e.g.*, *Massey* v. *Ojaniit*, 759 F.3d 343, 357 (4th Cir. 2014) (affirming judgment on the pleadings for government defendants because plaintiff could not overcome grand jury finding of probable cause). Plaintiffs can clear this hurdle with evidence of egregious misconduct, such as "fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Manganiello* v. *City of New York*, 612 F.3d 149, 162 (2d Cir. 2010) (quoting *Savino* v. *City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). Even if such misconduct can be shown, the plaintiff's claim *still* may fail if there was nonetheless non-tainted evidence sufficient to support probable cause. See, *e.g.*, *Taylor* v. *Meacham*, 82 F.3d 1556, 1562-1563 (10th Cir. 1996) (affirming summary judgment for the defendant because there was sufficient independent evidence of probable cause);

Durham v. *Horner*, 690 F.3d 183, 188-189 (4th Cir. 2012) (same).

Procedurally, the determination whether probable cause exists is a legal question, involving application of a familiar standard. Malicious prosecution cases are thus routinely resolved on probable cause grounds at the motion-to-dismiss stage, see, *e.g.*, *Meeks* v. *Larsen*, 611 Fed. Appx. 277, 282-283 (6th Cir. 2015); *Amato* v. *Pa. Office of Att'y Gen.*, 183 Fed. Appx. 260, 263-264 (3d Cir. 2006); *Almeida* v. *Rose*, 55 F. Supp. 3d 200, 204-205 (D. Mass. 2014), or on motion for summary judgment, see, *e.g.*, *Calvert* v. *Ediger*, 415 Fed. Appx. 80 (10th Cir. 2011); *Boydston* v. *Isom*, 224 Fed. Appx. 810, 815 (10th Cir. 2007). Adverse determinations are subject to *de novo* review. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). Thus, in the specific context of Fourth Amendment malicious prosecution claims, this Court has recognized that the probable cause issue has a "high probative force" and low judicial "cost." *Hartman* v. *Moore*, 547 U.S. 250, 265-266 (2006).

B. Qualified Immunity Protects Defendants From Questionable Claims

Immunity doctrines further protect defendants from questionable claims. As an initial matter, prosecutors generally face no threat of liability because they are protected by absolute immunity for their duties "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430-431 (1976); see also *Burns* v. *Reed*, 500 U.S. 478, 491, 494 (1991) (prosecutors have immunity for their duties "involv[ing] the prosecutor's role as advocate for the State" and "connected with the prosecu-

tor's role in judicial proceedings" (internal quotation marks omitted)).

Though not absolutely immune, law enforcement officials are still protected by qualified immunity, which shields a government official from liability unless the plaintiff shows *both* that the official violated the Constitution *and* that the unconstitutionality of the official's conduct was clearly established at the time the official acted.[6]

The layering of the qualified-immunity reasonableness inquiry on top of the "practical, commonsense" standard for determining the existence of probable cause provides particular protection to law enforcement officials. *Gates*, 462 U.S. at 238. Because "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," the Court has held that "in such cases th[e] officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Therefore, even if a plaintiff can establish a lack of probable cause, the defendant is still immune if the question of whether probable cause existed under the case's particular facts was reasonably debatable, such that the defendant's conduct fell "in the hazy border" between legality and illegality. *Brosseau* v. *Haugen*, 543 U.S.

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[6] After *Pearson* v. *Callahan*, 555 U.S. 223 (2009), courts are free to consider those two requirements in either order and typically address them in the manner that allows the court to most quickly dispose of the case. See, *e.g.*, *Durham*, 690 F.3d at 188 n.6 (4th Cir. 2012) ("[W]e are entitled to evaluate the two qualified immunity inquiries in either order. Because we can dispose of this case on the first step, we turn immediately to it.")

194, 201 (2004) (per curiam) (internal quotation marks omitted). Thus, even the mistaken judgments of law enforcement officials will not expose them to liability so long as they are reasonable.

Furthermore, qualified-immunity determinations are immediately appealable. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Qualified immunity gives officers "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* at 526. Thus, malicious prosecution defendants whose requests for qualified immunity are denied at the district court level can immediately seek appellate reversal. Immediate appellate review of adverse decisions is available to officials at both the motion-to-dismiss stage, see, *e.g.*, *Johnson* v. *Moseley*, 790 F.3d 649, 654-656 (6th Cir. 2015); *Arrington* v *City of New York*, 686 Fed. Appx. 46, 47-49 (2d Cir. 2015); *Rhodes* v. *Prince*, 273 Fed. Appx. 328, 330 (5th Cir. 2008), and the summary-judgment stage, see, *e.g.*, *Wood* v. *Kesler*, 323 F.3d 872, 882-883 (11th Cir. 2003); *Rohman* v. *New York City Transit Auth.*, 215 F.3d 208, 218 (2d Cir. 2000); *Lennon* v. *Miller*, 66 F.3d 416, 425 (2d Cir. 1995). *Mitchell*'s doctrine of immediate appealability ensures that meritless § 1983 malicious prosecution claims can be quickly defeated.

C. The Availability of Attorney's Fees Under 42 U.S.C. § 1988 Discourages Frivolous Claims

The availability of attorney's fees for prevailing defendants provides still further protection against

baseless Fourth Amendment malicious prosecution claims under § 1983. Federal law authorizes a prevailing party to seek attorney's fees in § 1983 cases, and this remedy is available to plaintiffs and defendants alike. See 42 U.S.C. § 1988(b). Prevailing defendants may be awarded attorney's fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). In malicious prosecution actions, courts have awarded fees to prevailing defendants where plaintiffs have ignored evidence clearly establishing probable cause to proceed with a prosecution. See, *e.g.*, *Fisher* v. *Wal-Mart Stores, Inc.*, 619 F.3d 811, 818-819 (8th Cir. 2010); *Thorpe* v. *Ancell*, 367 Fed. Appx. 914, 923-924 (10th Cir. 2010); *Abrams* v. *Pack*, Civ. A. Nos. 84-4341, 85-3174, 1987 WL 13095, at *1-2 (E.D. Pa. June 26, 1987). The threat of such fee awards provides a significant deterrent against § 1983 plaintiffs' pursuit of patently meritless malicious prosecution claims.

III. THIS COURT CAN PROVIDE DIRECTION TO LOWER COURTS BY CLARIFYING THAT MALICE IS NOT AN ELEMENT OF A § 1983 CLAIM GROUNDED ON THE FOURTH AMENDMENT AND BY ADOPTING JUSTICE GINSBURG'S VIEW OF CONTINUING SEIZURE

By holding that claims such as petitioner's are rooted in the text of the Fourth Amendment, this Court can provide needed guidance to lower courts. Adopting a Fourth Amendment-based approach would mean that lower courts evaluating such claims would apply a straightforward, objective test familiar from decades of use, under which subjective elements

such as malice would be unnecessary. Additionally, if this Court adopts the conception of continuing seizure set forth in Justice Ginsburg's concurring opinion in *Albright*, it would clarify the definition of seizure for lower courts and vindicate individuals' constitutional rights.

A. Because Fourth Amendment Inquiries Are Objective, Malice Is Not A Required Element For § 1983 Fourth Amendment Claims

Adopting the elements of the common-law malicious prosecution tort wholesale, some courts of appeals require § 1983 plaintiffs to present evidence of the defendant's subjective intent, or malice, directed toward the plaintiff. See *Manganiello*, 612 F.3d at 161; *McKenna* v. *City of Phila.*, 582 F.3d 447, 461 (3d Cir. 2009);[7] *Yousefian*, 779 F.3d at 1015; *Grider* v. *City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010). Other circuits, recognizing that proof of subjective malice is generally not required to establish a Fourth Amendment violation, do not require proof of malice to establish a § 1983 claim. See *Hernandez-Cuevas*, 723 F.3d at 100-101 (adopting a "purely constitutional approach" that does not require proof of malice); *Evans* v. *Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (stating that a "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorpo-

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[7] But see *Gallo*, 161 F.3d at 222 n.6 (interpreting *Albright* to suggest "a plaintiff would not need to prove all of the common law elements of the [malicious prosecution] tort" to succeed on claim, and further stating that under a Fourth Amendment framework, "it is unclear why a plaintiff would have to show that the police acted with malice").

rates certain elements of the common law tort," but not malice (quoting *Lambert* v. *Williams*, 223 F.3d 257, 261 (4th Cir. 2000))); *Castellano*, 352 F.3d at 954-955 (taking a purely constitutional approach to § 1983 malicious prosecution claims); *Sykes*, 625 F.3d at 309 ("In the context of malicious prosecution, the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice."); *Pierce*, 359 F.3d at 1288-1289 (explaining the circuit's approach of using the elements of the common law tort as a "starting point" for § 1983 claim analysis, but rejecting party's argument that "proof of each element of the common law tort * * * is a necessary predicate to a claim under § 1983," and further stating that "the ultimate question is always whether the plaintiff has alleged a constitutional violation").[8]

This Court should adopt the approach taken by the courts that do not require proof of malice. Although "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here," *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994), nothing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis.[9] To determine whether a pre-

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[8] The D.C. Circuit has not clearly decided whether malice is required. See *Pitt*, 491 F.3d at 511 (stating simply that "[w]e join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment").

[9] Under *Heck*, however, the malicious prosecution tort's favorable-termination requirement *is* relevant to the separate question of when a § 1983 cause of action challenging a pretrial

trial deprivation of liberty pursuant to legal process violates the Fourth Amendment, a court must consider (1) whether the deprivation constitutes a "seizure" for purposes of the Fourth Amendment, and (2) whether any such seizure was supported by probable cause. These are wholly objective inquiries that do not involve any consideration of the defendant official's subjective state of mind. See, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (stating that an otherwise objectively reasonable seizure is not rendered unreasonable by an officer's subjective intentions); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Clarifying that "malice" is not an element of § 1983 claims such as petitioner's will eliminate the doctrinal disagreement among the lower courts on this technical issue. It will also avoid any risk that subjective analyses of malice in § 1983 civil suits might improperly enter into Fourth Amendment inquiries in criminal cases.[10]

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seizure pursuant to legal process *accrues* (and thus the statute of limitations begins to run). *Heck*, 512 U.S. at 489-490. Although a § 1983 claim such as petitioner's accrues when the underlying criminal proceeding terminates in the plaintiff's favor, that provides no basis for incorporating a subjective inquiry regarding malice into the constitutional tort.

[10] Holding that "malice" is not an element of the § 1983 tort would not mark a sea change in the law, nor would it risk undermining state-law tort remedies that require proof of malice. In common-law malicious prosecution actions, malice may be inferred from a lack of probable cause, the basic prerequisite for a Fourth Amendment violation. See, *e.g.*, *Stewart* v. *Sonneborn*, 98 U.S. 187, 194 (1878); *Staunton* v. *Goshorn*, 94 F 52, 57 (4th Cir. 1899); *Cloon* v. *Gerry*, 79 Mass. (13 Gray) 201, 202 (1859);

B. The Court Should Hold, Consistent With Justice Ginsburg's *Albright* Concurrence, That Pretrial Restraints Short Of Official Custody Can Constitute Fourth Amendment "Seizures"

There is separate disagreement among lower courts that recognize § 1983 malicious prosecution claims on the definition of "seizure." Although this Court need not resolve the issue because petitioner's pretrial detention clearly constituted a seizure,[11] if the Court reaches the question, it should adopt the continuing seizure rationale set forth in Justice Ginsburg's concurring opinion in *Albright*. 510 U.S. at 277-279 (Ginsburg, J., concurring).

In *Albright*, Justice Ginsburg explained that at common law, "an arrested person's seizure was deemed to continue even after release from official custody." 510 U.S. at 277-278. Therefore, any distinction between pretrial incarceration and post-bail, pretrial restraints of movement or liberty was merely "a distinction between *methods* of retaining control over a defendant's person, not one between seizure and its opposite." *Id.* at 278 (emphasis added). As Justice Ginsburg explained, "[a] person facing serious criminal charges is

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Restatement (Second) of Torts § 669 (1977). Therefore, a § 1983 plaintiff who establishes a Fourth Amendment violation could, if required, use the same evidence to prove malice. See *Manganiello*, 612 F.3d at 163 (explaining in § 1983 case that "[a] lack of probable cause generally creates an inference of malice" (quoting *Boyd* v. *City of New York*, 336 F.3d 72, 78 (2d Cir. 2003))).

[11] See *Manuel* v. *City of Joliet*, 590 Fed. Appx. 641, 642 (7th Cir. 2015) (describing the circumstances of Manuel's arrest and weeks-long detention); see also *Albright*, 510 U.S. at 276 (noting that "submission to arrest unquestionably constitute[s] a seizure") (Ginsburg, J., concurring).

hardly freed from the state's control upon his release from a police officer's physical grip." *Ibid.* Such an individual "is required to appear in court at the state's command," is often subject to travel restrictions, and is likely to face severely diminished employment prospects, reputational harm, and financial and emotional strain pending trial. *Ibid.*; accord *Gerstein*, 420 U.S. at 114 ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty"). Therefore, a defendant "remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). At least three other Justices in *Albright* agreed with Justice Ginsburg's reasoning that a Fourth Amendment "seizure" may continue after a defendant is released from custody pending trial. See *id.* at 290 (Souter, J., concurring) (indicating that imposition of "bond terms" implicates Fourth Amendment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting) (agreeing with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable").

Since *Albright*, the Second Circuit has endorsed a theory of "continuing seizure," holding that pretrial release conditions, including out-of-state travel restrictions and requirements to appear in court, amount to a Fourth Amendment seizure. See *Rohman*, 215 F.3d at 216; *Murphy*, 118 F.3d at 946. The Third Circuit has likewise held that certain pretrial release conditions, such as travel restrictions, can amount to a seizure. See *Gallo*, 161 F.3d at 222 (holding that a combination of post-indictment restrictions—requirements to post a

$10,000 bond, not travel outside New Jersey and Pennsylvania, contact pretrial services weekly, and attend all court hearings—constituted a seizure).

Some circuits disagree, holding that pretrial release conditions, such as requirements to attend pretrial hearings and restrictions on out-of-state travel, do not give rise to a Fourth Amendment seizure. See *Harrington* v. *City of Nashua*, 610 F.3d 24, 32-33 & n.4 (1st Cir. 2010); *Karam* v. *City of Burbank*, 352 F.3d 1188, 1193-1194 (9th Cir. 2003); *Nielander* v. *Board of Cty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009); *Kingsland* v. *City of Miami*, 382 F.3d 1220, 1235-1236 (11th Cir. 2004). Those decisions, however, conflict with this Court's precedent. This Court has explained that "[a] person is seized by the police * * * when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement 'through means intentionally applied.'" *Brendlin* v. *California*, 551 U.S. 249, 254 (2007) (quoting *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991), and *Brower* v. *Cty. of Inyo*, 489 U.S. 593, 597 (1989)) (emphasis omitted). When the circumstances of a situation are ambiguous, this Court has asked "whether a reasonable person * * * would have believed himself free to 'terminate the encounter' between the police and himself." *Id.* at 256-257 (quoting *Bostick*, 501 U.S. at 436); see also *Scott* v. *Harris*, 550 U.S. 372, 381 (2007) ("[A] Fourth Amendment seizure [occurs] * * * when there is a governmental termination of freedom of movement through means intentionally applied." (alterations in original)); *United States* v. *Drayton*, 536 U.S. 194, 201 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.").

These articulations of what constitutes a seizure are consistent with Justice Ginsburg's opinion in *Albright*. Pretrial restrictions of liberty and movement, such as travel restrictions or the requirement to make several court appearances, are "intentionally applied," and criminal defendants lack any independent authority to "terminate" such restrictions, which are generally backed up by the threat that pretrial release may be revoked if the restrictions are violated.

This conception of what constitutes a seizure is appropriate to effectuate the protections intended by the Fourth Amendment. As at common law, seizure under the Fourth Amendment is not limited to circumstances where an individual is incarcerated before trial. It encompasses other pretrial restrictions on liberty short of physical detention, such as travel restrictions when an individual is released on bond, requirements to appear in court before trial, and obligations to regularly contact pretrial services officers. See, *e.g.*, *Rohman*, 215 F.3d at 216; *Gallo*, 161 F.3d at 222; see also *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring) (defendant released pretrial may still be "'seized' in the constitutionally relevant sense"). Because the Fourth Amendment requires a judicial determination of probable cause for "*any* significant pretrial restraint of liberty," *Gerstein*, 420 U.S. at 125-126 (emphasis added), this Court should correct the crabbed definition of "seizure" adopted by some lower courts, which unduly limits the Fourth Amendment's protections.

CONCLUSION

For these reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted.

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Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National District Attorney's Association is the oldest and largest organization representing the Nation's prosecutors. Its aim is to assist prosecutors in their mission of safeguarding the public and ensuring that justice is done. Its approximately 7,000 members, including most of the Nation's local prosecutors, assistant prosecutors, investigators, victim advocates, and paralegals, are responsible for enforcing the criminal laws of every State and territory. The mission of the Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the People. Although NDAA's members have a duty to represent the government zealously, they are also joint partners with the courts in the pursuit of justice. Their practical experience provides important insight in assessing how best to achieve that shared goal, and their perspective should be particularly valuable in this case.

This case raises a concerning issue for prosecutors and law enforcement professionals nationwide. The issue before the Court concerns the proper means by

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

which a criminal defendant may challenge aspects of his criminal prosecution. Allowing Fourth Amendment challenges to pretrial detention that occurred after the defendant's first appearance to proceed under the Fourth Amendment would open the door to new challenges by criminal defendants to grand jury proceedings, preliminary hearings, and even trials if they merely claim that these proceedings resulted in a lengthy detention without probable cause.

Amicus has expertise in the criminal process from arrest through prosecution and believes that this brief will assist the Court in its consideration of this matter.

SUMMARY OF THE ARGUMENT

I. Though the details vary from jurisdiction to jurisdiction and from case to case, many criminal prosecutions follow a fairly similar path. First, police officers arrest a suspect without a warrant and take him to the station house for booking. Within a day or two, the suspect is brought before a magistrate for his first appearance. At that hearing, the magistrate determines whether there is probable cause to support his arrest and detention, notifies the now-defendant of the charges against him, and decides whether or not to let him out on bail.

After the first appearance, every State uses at least one of two additional procedures designed to check the State's decision to prosecute: some hold preliminary hearings to determine whether the defendant should be taken to trial, while others

conduct grand jury proceedings toward the same end. Unless the defendant prevails in one of those proceedings, he must convince the prosecution to drop its case, plead guilty, or face trial.

II. As the steps laid out above illustrate, after the defendant's first appearance, his continued detention stems from the pending charges against him, not from his initial warrantless arrest. At the first appearance, the State formally commits itself to prosecute him absent some change in circumstance. And after that first appearance, the defendant may not seek to revisit the initial probable-cause determination, but must instead prevail at a preliminary hearing or avoid indictment by the grand jury to secure his release. Because the first appearance marks the line between police-led efforts to detain suspected criminals and prosecution-led efforts to convict them, any challenge to detention after that point cannot be governed by the Fourth Amendment and must instead fall within the Due Process Clause.

ARGUMENT

I. THE FIRST APPEARANCE AND ITS PLACE IN THE PRETRIAL PROCESS

Every U.S. jurisdiction guarantees every person who is arrested a first appearance before a judicial officer at some point shortly after arrest. *See* Fed. R. Crim. P 5 (federal requirements); 2 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 6.3(c) (4th ed. 2015) (noting that the right to a "prompt appearance" is "a common if not universal

requirement under state law"). The terminology for this beginning judicial procedure differs widely; federal practice, for instance, refers to it as an "initial appearance," Fed. R. Crim. P. 5, or as "presentment," *Corley v. United States*, 556 U.S. 303 (2009), while state nomenclature shows even more color.[2] The timelines for these hearings also differ somewhat as well; many States set a fixed limit (generally between twenty and twenty-four hours from arrest, but sometimes up to forty-eight hours), while others use a standard rather than a rule (such as requiring that defendants be brought before a magistrate without "unreasonable" or "unnecessary" delay). *See Jenkins v. Chief Justice of Dist. Ct. Dep't*, 619 N.E.2d 324, 333–34 (Mass. 1993) (cataloguing the variations).

Despite these minor differences, first appearances across jurisdictions perform several of the same basic functions. *First*, the first appearance often serves as the first time at which a disinterested entity finds probable cause to support the defendant's initial arrest and detention. Of course, where the defendant was arrested pursuant to a warrant, someone other than the police has generally determined that probable cause justified

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[2] *See, e.g.*, Alaska R. Crim. P. 5(c) ("[f]irst [a]ppearance"); Mich. Ct. R. 6.104 ("arraignment on the warrant or complaint"); Pa. R. Crim. P 540 ("preliminary arraignment"); *Rothgery v. Gillespie County*, 554 U.S. 191, 195 (2008) (noting that Texas simply calls them "Article 15.17 hearings" in reference to their statutory home).

the arrest: either a magistrate approved an arrest warrant after making such a determination, *see* U.S. Const. amend. IV, or the arrest warrant stemmed from a grand jury indictment, which "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry," *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975).

"The vast majority of arrests for felonies," however, "are made without first seeking a warrant." Yale Kamisar, *et al.*, *Modern Criminal Procedure* 10 (13th ed. 2012). In *Gerstein*, this Court held that though "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime[] and for a brief period of detention to take the administrative steps incident to arrest," 420 U.S. at 113–14, the Fourth Amendment requires "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," one that "must be made by a judicial officer either before or promptly after arrest," *id.* at 125; *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (the *Gerstein* determination must generally be made within 48 hours of the defendant's arrest).

Gerstein also held, however, that this judicial determination need not be made with the "full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process"—often used in later pretrial proceedings to determine whether the defendant should face trial. 420 U.S. at 119; *see id.* at 119–20. Instead, because

the "sole issue is whether there is probable cause for detaining the arrested person pending further proceedings," the determination may be made just like the one to issue a warrant before an arrest: "by a magistrate in a nonadversary proceeding on hearsay and written testimony." *Id.* at 120.

As indicated above and in keeping with *Gerstein*'s own suggestion, *see id.* at 123, many States use the defendant's first appearance as the chance to make any required probable-cause determination.[3] Also in keeping with *Gerstein*'s emphasis on the need for flexibility, most jurisdictions tend to keep the entire first appearance, including the probable-cause

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[3] *See, e.g.*, Me. R. Unified Crim. P. 5(a)(2) ("Defendants arrested without a warrant shall be taken before the court. The complaint or information shall be filed in the Unified Criminal Docket forthwith. A determination of probable cause shall be made in accordance with Rule 4A unless an indictment has been returned."); Miss. Unif. R. Cir. & Cty. Ct. Prac. 6.03 ("If the arrest has been made without a warrant, the judicial officer shall determine [at the first appearance] whether there was probable cause for the arrest and note the probable cause determination for the record."); N.H. R. Crim. P. 4(e) ("*Gerstein Determination.* If the defendant was arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant that was not issued by a judge and is held in custody, the court shall require the state to demonstrate probable cause for arrest."); Wyo. R. Crim. P. 5(a) ("When a person arrested without a warrant is brought before a judicial officer an information or citation shall be filed at or before the initial appearance and, unless a judicial officer has previously found probable cause for the arrest, probable cause shall be established by affidavit or sworn testimony.").

determination, "quite brief," 1 LaFave, *supra*, § 1.4(g), and rather informal. Michigan, for example, allows the use of "two-way interactive video technology to conduct" the first appearance, Mich. Ct. R. 6.006(A), and Utah allows "verbally" or "electronically" communicated probable-cause statements, so long as they are "reduced to a sworn written statement prior to submitting the probable cause issue to the magistrate for decision," Utah R. Crim. P. 7(c)(2)(A).

Second, the first appearance also serves as the time at which the State informs the defendant of the basics surrounding his impending criminal prosecution. Because the first appearance generally follows, is simultaneous with, or immediately precedes the filing of a criminal complaint specifying the particular charges for which the State intends to prosecute the defendant,[4] the magistrate uses the

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[4] *See, e.g.*, Ariz. R. Crim. P. 4.1(b) (anyone arrested without a warrant must be taken "before the nearest or most accessible magistrate" and "a complaint, if one has not already been filed," must be filed within 48 hours of the first appearance or else the defendant "shall be released from jail[] and the preliminary hearing date, if any, shall be vacated"); Fed. R. Crim. P. 5(b) (providing in connection with first appearances that "[i]f a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed"); W. Va. R. Crim. P. 5(a) ("An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested

first appearance to inform the defendant of the substance of those charges.[5] The magistrate also generally informs the defendant about the next steps in the criminal process and about some of his legal rights during that process. Though "[t]he range of rights and proceedings mentioned will vary from one jurisdiction to another," "[c]ommonly[] the magistrate will inform the defendant of his right to remain silent," and the magistrate will "always" tell the defendant about "at least the very next proceeding in the process, which usually will be a preliminary hearing." Kamisar, *supra*, at 14. If the defendant lacks counsel at the first appearance, the magistrate will also inform him of his right to counsel, including the right to appointed counsel if he is indigent. *Id.*[6]

(continued...)

without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.")

[5] *See, e.g.*, Ariz. R. Crim. P 4.2(a)(2) (the magistrate must "[i]nform the defendant of the charges" at the first appearance); Me. R. Unified Crim. P. 5(b)(1) (the defendant must be informed of "the substance of the charges against [him]").

[6] *See, e.g.* Cal. Const. art. I, § 14 ("A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send

These disclosures highlight perhaps the most salient feature of the first appearance: it marks "the starting point of our whole system of adversary criminal justice," the first time at which "the government has committed itself to prosecute, ... the adverse positions of government and defendant have solidified ... [,] and [the] defendant finds himself faced with the prosecutorial forces of organized society[] and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). As the Court put it in *Rothgery*, once the first appearance has started the formal wheels of criminal justice in motion, the State has committed to the prosecution and the defendant must respond accordingly. Of course, "[t]he State may rethink its commitment at any point: it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi* after the case gets to the jury room." *Rothgery*, 554 U.S. at 210. "But without a change of position, a defendant subject to accusation after

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for counsel, and on the defendant's request read the complaint to the defendant."); Md. R. 4-213(a)(3) ("The judicial officer shall require the defendant to read the notice" listing his rights or "shall read the notice to a defendant who is unable for any reason to do so."); N.D. R. Crim. P 5(b)(1) ("The magistrate must inform the defendant" of his right "to have legal services provided at public expense to the extent that [he] is unable to pay for the defendant's own defense without undue hardship," provided that "the offense charged is one for which counsel is required.").

initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id.*

Third, many jurisdictions use the first appearance as the first opportunity at which to determine whether to release the defendant on bail or other forms of conditional release. Though the details vary considerably, in the "[t]ypical" case, an arrested defendant is "taken to the nearest station house and then transported to the city jail within 24 hours." 4 LaFave, *supra*, § 12.1(b). Although some jurisdictions offer defendants charged with less serious crimes the chance to secure release at the station house, for many defendants charged with more serious offenses the first appearance offers the first chance to post bail. *See id.* Once again, the details of this aspect of the first appearance differ widely. Utah, for example, generally uses a "Uniform Fine / Bail Schedule" that assigns bail amounts based on the severity of the charges. *See* Utah R. Crim. P 7(c)(3)(B). Maryland, by contrast, instructs the judicial officer to consider a whole host of factors, including "the nature and circumstances of the offense charged," "the nature of the evidence against the defendant," "the potential sentence upon conviction," flight risk, family ties, possible dangerousness, and information provided by the defendant or his counsel. Md. R. 4-216(e)(1)(A); *see also id.* R. 4-216(a) (instructing magistrates to consider bail only after determining probable cause in the case of warrantless arrests). If the defendant

cannot make (or is not offered) bail at his first appearance, he is remitted, not back to police custody, but to the county jail or its local equivalent.

After the defendant's first appearance, every jurisdiction provides at least one of two major pretrial procedures to further screen the State's decision to prosecute: a preliminary hearing or grand jury review. Practically every jurisdiction statutorily affords felony defendants a preliminary hearing (sometimes also called a "preliminary examination," a "probable cause" hearing, a "commitment hearing," an "examining trial," or a "bindover hearing") at some point "from a few days to a few weeks following" the defendant's first appearance. 4 LaFave, *supra*, §§ 14.1(a), 14.2(f).[7]

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[7] Though almost every state guarantees defendants a preliminary hearing in certain circumstances, the actual usage of those hearings varies widely. Each of the eighteen states in which all felony prosecutions must be preceded by a grand jury indictment also provides the defendant with the right to a preliminary hearing, though that hearing may be (and in some jurisdictions must be) bypassed if the grand jury returns an indictment prior to the hearing. *See* 4 LaFave, *supra*, § 14.2(c); *see also* Fed. R. Crim. P 5.1(a)(2) (no need for a preliminary hearing where "the defendant is indicted"). The vast majority of the remaining states, where felony prosecutions may be initiated either by information or by indictment, also grants defendants the right to a preliminary hearing. *See* 4 LaFave, *supra*, § 14.2(d). Again, though, actual practice varies considerably: some allow "direct filing" of an information without a preliminary hearing, many make a preliminary hearing a prerequisite to filing an information, some require a preliminary hearing even where an indictment is returned, and so on. *See id.*

These open, adversarial hearings require the prosecutor to prove to a judge that there is sufficient evidence to "bind the case over" for additional prosecution (either indictment by a grand jury or the filing of an information). In this way, these hearings "prevent hasty, malicious, improvident, and oppressive prosecutions, ... protect the person charged from open and public accusations of crime, ... avoid both for the defendant and the public the expense of a public trial, ... [and] save the defendant from the humiliation and anxiety involved in public prosecution." *Thies v. State*, 189 N.W. 539, 541 (Wis. 1922). Preliminary hearings also give courts an opportunity to revisit bail decisions made on the basis of the often limited information available at the first appearance. *See* 4 LaFave, *supra*, § 14.1(e).

Some States use the grand jury in lieu of (or in addition to) the preliminary hearing as a means by which to review the State's decision to prosecute those arrested without a warrant. Though the prosecutor largely directs grand jury proceedings in such circumstances, the grand jury retains its historic screening function because it must independently decide whether the State has proffered enough evidence to put the defendant on trial. The standard that the prosecution must meet to justify a prosecution differs across jurisdictions,[8]

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[8] Some States ask whether there is probable cause to believe that the accused committed the crimes charged. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-5-204(3)(e); Nev. Rev. Stat. Ann. § 172.155. Other States, however, use the "prima facie

but the consequences of the grand jury's decision are largely the same. If it finds that there is sufficient evidence to move forward, that finding—generally made "without any review, oversight, or second-guessing," *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014)—authorizes the defendant's continued detention and subsequent prosecution. If, however, the grand jury exercises its "complete independence in refusing to indict," 4 LaFave, *supra*, § 15.2(g), the prosecution may not proceed without additional steps, such as resubmission of the case to a second grand jury, *see id.* § 15.2(h).

After the defendant's first appearance, the wheels are thus set in motion for his ultimate prosecution. If he can convince the prosecution to drop its case, win at the preliminary hearing, or avoid indictment by the grand jury, he will not face prosecution. Otherwise, he must plead guilty or stand trial.

(continued...)

evidence" standard, which authorizes an indictment only "when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." 4 LaFave, *supra*, § 15.2(f); *see also, e.g.*, Cal. Penal Code § 939.8; *Trap Rock Indus., Inc. v. Kohl*, 284 A.2d 161 (N.J. 1971).

II. AFTER THE FIRST APPEARANCE, THE DEFENDANT IS HELD BECAUSE OF HIS ONGOING PROSECUTION, NOT BECAUSE OF HIS INITIAL ARREST

The prosecutorial pathway laid out above is quite commonplace—it is essentially identical to the one that *Rothgery* traveled, *see* 554 U.S. at 195–96 (warrantless arrest, then first appearance with probable-cause determination, notification of charges, and release on bail, then indictment, then prosecutor's motion to dismiss), and it closely tracks the one followed here, *see* Resp. Br. 10–12 (warrantless arrest, then criminal complaint, then first appearance with *Gerstein* determination, notification of charges, and bail proceedings, then transfer to county jail, then indictment, then arraignment, then *nolle prosequi*). As this pathway demonstrates, the first appearance marks a crucial turning point in the defendant's detention. From that point forward, the defendant is not being held because of his original arrest and its accompanying finding of probable cause. Rather, he is detained because of an ongoing, prosecution-driven effort to convict him of the formal charges that he now faces.

Each aspect of the typical prosecution discussed above proves as much. Consider, for instance, the notification of formal charges that takes place at the defendant's first appearance. As this Court has repeatedly emphasized, these formal charges (and the disclosures that accompany them) inform the defendant that the relationship between him and the State has become "solidly adversarial." *Rothgery*,

554 U.S. at 202; *see also, e.g.*, *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986) (noting that the first appearance "signals the initiation of adversary judicial proceedings"), *overruled in part on other grounds by Montejo v. Louisiana*, 556 U.S. 778 (2009). And as this Court also emphasized in *Rothgery*, once the defendant has been notified of the formal charges against him at his first appearance, the case is destined for prosecution: unless there is a "change of position" from the prosecution (not the police), the defendant is "headed for trial and needs to get a lawyer working," either to avoid that trial or be ready when it comes. 554 U.S. at 210.

The bail-related portion of the initial appearance also reflects the extent to which, after that point, the defendant is held as part of an ongoing prosecution rather than due to his original arrest. Bail is expressly designed with future proceedings in mind: the magistrate, who herself may have "no jurisdiction" to make the defendant "answer for a crime or offense," assigns bail "to secure [the defendant's] appearance ... before the court in which he may be prosecuted." *Virginia v. Paul*, 148 U.S. 107, 119 (1893); *see also* 4 LaFave, *supra*, § 12.1(b) ("The typical state statute declares that the objective of bail is to secure the defendant's attendance at the proceedings against him and to prevent his punishment before conviction."). Indeed, the defendant's physical location after the first appearance itself demonstrates that he is being held because of his pending prosecution rather than his initial arrest; if he does not make (or is not offered)

bail, rather than sit in the stationhouse lockup, he will be detained in the county jail or analogous facility with everyone else awaiting trial.

The probable-cause determination that often accompanies the defendant's first appearance does not change this conclusion. To be sure, where the *Gerstein* determination precedes the first appearance, it may make sense to say that the defendant is detained pursuant to that probable-cause determination. But once the State has initiated formal criminal process during that first appearance, the initial probable-cause determination soon falls out of the picture. The defendant may not challenge or revisit it, but instead is given other fora in which to contest his ongoing detention: he can win before the judge at the preliminary hearing or before the grand jury during those proceedings, successfully move to quash or dismiss any indictment or information, or prevail upon the prosecutor to drop the case.[9]

Those remaining steps of the pretrial process underscore the difference between detention due to the defendant's initial arrest and detention due to his subsequent prosecution. Neither the preliminary

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[9] In some jurisdictions, defendants may seek habeas corpus relief from an adverse finding at a preliminary hearing before the filing of an information or indictment. *See Sheriff of Humboldt Cty. v. Lang*, 763 P.2d 56 (Nev. 1988). Because motions to quash or dismiss informations or indictments are now widely available, relief via habeas corpus is generally not. *See* 4 LaFave, *supra*, § 14.3(d) n.95 (collecting cases).

hearing nor the grand jury's review focuses on the backward-looking questions of whether the defendant was lawfully arrested or lawfully held immediately after his arrest. Instead, each asks whether there is sufficient reason to believe that the defendant committed the crime of which he now stands formally accused. *See supra* 11–13 & n.8.

Though that standard sounds similar to the one used to secure an arrest warrant or make a post-arrest *Gerstein* determination, the advance in procedural posture matters. Unlike the informal, ex parte procedures used to secure a warrant or make a *Gerstein* determination, preliminary hearings are fully adversarial, generally allowing the defendant to cross-examine the prosecution's witnesses and to put on his own. As a result, the magistrate's conclusion at the preliminary hearing does not "merely duplicate the earlier decision made in the same case ... in the issuance of an arrest warrant or in the ex parte post-arrest [*Gerstein*]" determination. 4 LaFave, *supra*, § 14.3(a).

So too for the grand jury. Though the prosecutor often controls the presentation of evidence there, the grand jury generally retains the power to compel additional evidence, and in more than a dozen States it must compel that evidence if it has reason to believe that the evidence will disprove the charge. *See id.* § 15.2(b). Moreover, even though grand jury proceedings are not adversarial, most prosecutors will allow the defendant to testify (if he so chooses), and some States specifically provide that defendants may testify upon request. *See id.* § 15.2(c). Thus,

even though prosecutors play a key role in shaping many grand jury proceedings, those proceedings do not simply rehash probable-cause determinations made earlier in the case. Both the preliminary hearing and the grand jury's review thus illustrate that the defendant's continued detention results from the pending proceedings against him, not his original arrest.

* * *

The defendant's initial appearance before a magistrate marks a turning point between his initial arrest and his ongoing confinement. From that point forward, it is the State's machinery of criminal justice—its decision to press formal charges, the finding of probable cause at the preliminary hearing, and the grand jury's return of a true bill—that is responsible for the defendant's condition, not the police officer's decision to arrest. At the point of the first appearance, then, the Fourth Amendment "falls out of the picture," *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014), leaving to the Due Process Clause the task of regulating the ongoing prosecution, *see Albright v. Oliver*, 510 U.S. 266, 282–86 (1994) (Kennedy, J., concurring). For that reason, Petitioner's attempt to extend the Fourth Amendment to cover all pretrial detention must fail.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Police Accountability Project (NPAP) is a nonprofit public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. Founded in 1999 by members of the National Lawyers Guild, NPAP has more than five hundred attorney members throughout the United States who represent victims of police misconduct and other civil rights violations. NPAP provides public education and information on issues relating to police misconduct, and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through amicus curiae filings in cases raising issues that transcend the interests of the parties. One of the central missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States.[1]

SUMMARY OF ARGUMENT

The National Police Accountability Project agrees with Petitioner that pretrial detention in the absence of probable cause violates the Fourth Amendment—and that, as a result, 42 U.S.C. § 1983 provides a remedy for that violation. We write to flesh out, from the practical perspective of civil rights practitioners litigating police

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1. Pursuant to Supreme Court Rule 37, the parties have lodged blanket consents for the filing of amicus briefs on behalf of Petitioner or Respondents. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation or submission of this brief.

misconduct cases, how this § 1983 remedy is necessary to allow for the full compensation and deterrence § 1983 was enacted to provide. We highlight the many state laws and practices—such as sovereign immunity bars on malicious prosecution claims, strict notice of claim requirements, the unavailability of attorney's fees, caps on damages, and difficulties collecting state court judgments—which alone and in combination preclude or severely restrict the viability of malicious prosecution claims under state law. Absent a federal remedy under § 1983, many victims of this serious police misconduct would not be able to seek recourse, leaving them uncompensated and the misconduct undeterred.

ARGUMENT

I. Section 1983 provides a critical safeguard against official abuse, by deterring civil rights violations and, when that deterrence fails, compensating victims.

As this Court has repeatedly recognized, "[t]he central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Indep.*, 445 U.S. 622, 650 (1980) (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961)).

One of the archetypical "misuse[s] of power . . made possible only because the wrongdoer is clothed with the authority of state law," *id.*, is the unwarranted detention of a person in violation of the Fourth Amendment, which "imposes limits on search-and-seizure powers in

order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). The rights protected by the Fourth Amendment have long been viewed as "indispensable to the full enjoyment of personal security, personal liberty and private property . . . [and] the very essence of constitutional liberty." *Gouled v. United States*, 255 U.S. 298, 304 (1921) (internal quotation and citation omitted). Indeed, as Justice Kennedy has noted, "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference . . . [and] freedom from this restraint is essential to the basic definition of liberty . . . ." *Foucha v. Louisiana*, 504 U.S. 71, 90 (1992) (Kennedy, J., dissenting).

In enacting § 1983, Congress recognized that providing a remedy for such constitutional violations benefited not only civil rights plaintiffs, but the broader public. "When a plaintiff succeeds in remedying a civil rights violation . . . he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011) (internal citation and quotation marks omitted); *see also City of Riverside v. Rivera*, 477 U.S. 561, 574–75 (1986) ("Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by [§ 1983], over and above the value of a civil rights remedy to a particular plaintiff.") (internal citation and quotation marks omitted).

As a result, the statute was drafted broadly, and "is to be accorded a sweep as broad as its language." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (internal citation and quotation marks omitted). It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983. Thus, under the plain language of § 1983, if an officer causes a deprivation of a constitutional right—such as the Fourth Amendment right not to be seized without probable cause—Section 1983 provides a federal cause of action.

The creation of an individual civil rights cause of action is a critical safeguard against official abuse. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. Such a remedy acts both "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." *City of Riverside*, 477 U.S. at 575.

And in Congress' judgment it was crucial that this be a *federal* remedy. At the time § 1983 was enacted, "the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. . . . '[T]he very purpose of

§ 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.'" *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). "Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion. . . . [I]n many cases there is 'no quarrel with the state laws on the books'; instead, the problem is the way those laws are or are not implemented by state officials." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Monroe*, 365 U.S. at 176).[2]

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2. In other words, a federal § 1983 malicious prosecution suit based on the Fourth Amendment does not depend in any way on the adequacy or inadequacy of potential state remedies. The same is not true, however, under the rule adopted by the Seventh Circuit below—which held both that a § 1983 malicious prosecution remedy could *only* be based on a procedural due process theory, and that, under *Parratt v. Taylor*, 451 U.S. 527 (1981), a state that provides an adequate post-deprivation remedy has not violated procedural due process. *See* J.A. 102. We agree with Petitioner that the Seventh Circuit was wrong on both counts. *See* Petitioner's Br. at 32–33. A claim for unwarranted pretrial detention is plainly covered by the Fourth Amendment, regardless of whether the Due Process Clause provides protection as well, and, in any event, *Parratt* has no place in the analysis. But under the Seventh Circuit's rule, courts would need to conduct a detailed analysis of the limitations of the state-law malicious prosecution remedy as applied to each individual suit, making the existence of a

II. State laws and practices limit or eliminate malicious prosecution remedies.

The common law has long recognized a cause of action for malicious prosecution, which "permits damages for confinement imposed pursuant to legal process." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). As this Court has instructed, any claim for damages based on detention after the "issuance of process or arraignment . . . must be based on a malicious prosecution claim." *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (internal citation and quotation marks omitted).

In theory, such common law malicious prosecution claims could be brought in state court against state and local law enforcement officers who have wrongfully used legal process to detain a person without probable cause. But in reality, a number of legal and practical impediments to such claims make this state law remedy at best woefully incomplete, and at worst completely illusory.

"Section 1983 . . . creat[es] a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials." *Felder*, 487 U.S. at 141. Any state law remedy that could

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federal malicious prosecution claim in any particular case both complicated and unpredictable. And despite the many legal and practical restrictions on the accessibility of state law remedies discussed in this brief, a federal § 1983 malicious prosecution claim would still often be unavailable. *See, e.g.*, *Easter House v. Felder*, 910 F.2d 1387, 1406 (7th Cir. 1990) (en banc) (holding *Parratt* bars a § 1983 cause of action "unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent").

provide an alternative to § 1983 necessarily runs against the same governmental defendants. But where state and local governments both enact the rules determining the viability of such claims and defend and ultimately pay for judgments against officers sued under these claims, they have an incentive directly counter to that of victims of police misconduct: "to minimize governmental liability." *Id.* at 141. This incentive to limit government liability is reflected in state laws burdening or impeding such claims—including, in a number of states, laws fully immunizing state and local officials from malicious prosecution suits. *See infra* I.A. Even in states that do not completely immunize officers for malicious prosecution, state laws still restrict malicious prosecution claims in a variety of ways, providing what this Court has described in like contexts as "effectively an immunity statute cloaked in [other] garb." *Haywood v. Drown*, 556 U.S. 729, 742 (2009).

And any states that have not yet enacted restrictions on malicious prosecution suits under state law are free to do so at any time. Indeed, in most states there is currently little incentive to restrict malicious prosecution suits under state law because, given the existence of a federal remedy recognized by nearly all of the federal courts of appeal, state law restrictions would have limited effect; victims of civil rights violations can simply proceed under federal law. But if no federal remedy is available, states and municipalities will have even more incentive to limit or completely eliminate malicious prosecution suits against state and local officers, an option history tells us at least some localities will be certain to take. Without a federal remedy, then, the availability of effective deterrence of malicious prosecutions—and compensation of victims

when deterrence fails—will be subject to the vagaries of local law. Nothing would prevent any given municipality or state from enacting laws shielding its officers from liability or otherwise restricting the viability of malicious prosecution claims.

This brief provides background about how malicious prosecution claims are actually litigated in state courts throughout the country, describing the many limitations that currently exist—and which more states and municipalities are free to enact in the future—based on the experiences of the civil rights litigators in the National Police Accountability Project. As these experiences demonstrate, a federal remedy is necessary to fulfill the aims that motivated Congress to enact § 1983: compensating the victims of unwarranted police detentions, as well as deterring future misconduct, to the benefit of the greater public:

> "It is unthinkable that there would be no constitutional remedy when a state actor incarcerates a person maliciously and without probable cause, depriving him of liberty without justification—the exact kind of wrongful state action the Fourth Amendment was designed to prevent."

Craig Futterman, director of the Civil Rights and Police Accountability Project at the University of Chicago Law School, who has been litigating criminal defense and civil rights cases for 25 years and been a clinical law professor for 16 years at the University of Chicago.

> "Federal civil rights suits under § 1983 provide the last and best protection against malicious prosecution by state actors—where the deck is stacked in favor of the police and against the poor, ethnic minorities, and the socially disadvantaged."

John Burris, an NPAP board member, who has litigated federal civil rights cases for over 30 years in Oakland, California.

> "Effective protection of civil rights relies largely on the efforts of private citizens whose rights have been violated, mostly poor and disenfranchised private citizens. The state has hedged its responsibility for reparation to those whose rights its officers have abused. The citizen cannot safely rely on the state itself to protect adequately against the abuses of state power. Section 1983 provides a uniform, consistent and powerful remedy for the protection of federal constitutional and statutory rights from malefactors clothed with state power."

Julia Yoo, an NPAP board member, who has had a civil rights practice in Denver and San Diego for 18 years.

> "In the real world rogue police officers, on occasion, initiate charges against subjects for improper reasons—love triangles, the use of confiscated drugs by the officer himself, desire for advancement in the department, or the like. People harmed by such misconduct deserve a remedy and in some such situations

> malicious prosecution will be the only viable cause of action. But in a state like Missouri where the offending officer is judgment proof and sovereign immunity eliminates recovery against the municipality, state law does not provide that remedy. Only a federal malicious prosecution claim would offer these plaintiffs access to justice."

W. Bevis Schock, an NPAP member who has been litigating § 1983 police misconduct suits in St. Louis, Missouri for 30 years.

A. In many states, sovereign immunity precludes or limits state law remedies for malicious prosecution.

"[A] State cannot immunize an official from liability for injuries compensable under federal law." *Howlett v. Rose*, 496 U.S. 356, 360 (1990). Whenever a state has attempted to do so, this Court has held that those attempts violate the Supremacy Clause. *See, e.g.*, *Haywood*, 556 U.S. at 729–30 ("Whatever its merits, New York's policy of shielding correction officers from liability when sued for damages arising out of conduct performed in the scope of their employment is contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages."); *Howlett*, 496 U.S. at 383 ("[A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage."); *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law.").

But there is no limit on a state's ability to immunize its own officers, or those of local municipalities, for claims arising under state law. Unsurprisingly, given the financial and political incentives states have to limit their own liability in such suits, many states have already done so.

Several states specifically immunize government employees, including state and local police officers, from liability for common law malicious prosecution claims. For example, in California, a "public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, *even if he acts maliciously and without probable cause*." *Asgari v. City of Los Angeles*, 937 P.2d 273, 278 (Cal. 1997) (emphasis added) (quoting CAL. GOV'T CODE § 821.6). Other states have similar provisions, completely immunizing malicious prosecution no matter how egregious the underlying police misconduct.[3]

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3. *See, e.g.*, IND. CODE ANN. § 34-13-3-3(6), amended by Pub. L. No. 220–2013 § 2 (effective July 1, 2016) (Indiana's Tort Claims Act immunizes officers from any liability arising out of the "initiation of a judicial or administrative proceeding."); *Dickerson v. Mertz*, 547 N.W.2d 208, 212–13 (Iowa 1996) (Iowa's Tort Claims Act immunizes malicious prosecution claims against state officials, such as state police.); *Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993) (Maine Tort Claims Act "confers immunity on the police officers for their decision to prosecute the criminal charges on which the malicious prosecution claims are based."); *McKenna v. Julian*, 763 N.W.2d 384, 389–90 (Neb. 2009) (Nebraska's Political Subdivisions Tort Claims Act immunizes any officer, agent, or employee of a political subdivision for claims "arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."); *Gedrich v. Fairfax Cty. Dep't of Family Servs.*, 282 F. Supp. 2d 439, 477 (E.D. Va.

By operation and design, these statutes prevent victims of malicious prosecution from seeking redress under state law and insulate officers from any liability for their misconduct. In those states, the only available remedy when an officer causes a person to be seized and prosecuted without probable cause is a suit under § 1983 for vindication of federal rights. As Michael Seplow, an NPAP member who has practiced civil rights law in Los Angeles for over 24 years, explains:

> "An innocent person may spend months or even years in pretrial detention before he is exonerated. But under California law, no damages are recoverable for any of the time in detention after arraignment—which typically occurs within a few days after arrest. Without a federal remedy, many innocent persons who were denied their liberty will be left with no recourse whatsoever."

John Burton, President of the NPAP Board of Directors, and who has also practiced civil rights law in California for over 32 years, agrees:

> "In California we must depend on § 1983 as the sole remedy for harms and losses sustained

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2003) (Virginia immunizes officers from "'[a]ny claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause.'" (citing Virginia Tort Claims Act, VA. CODE § 8.01–195.3(6))); *see also Hall v. Washington Metro. Area Transit Auth.*, 468 A.2d 970, 973 (D.C. 1983) (holding that interstate compact approved by Congress immunized transit police officers operating in Washington D.C., Maryland, and Virginia from liability for malicious prosecution).

after the wrongful arrest itself because of the immunity from claims of malicious prosecution provided by California statute, and the state appellate decisions broadly interpreting that statute."

B. State law notice of claim requirements prevent many meritorious suits.

Many states also impede viable civil rights claims by enacting stringent procedural hurdles, most notable of which are notice of claim and exhaustion requirements. These provisions require claimants to serve the government entity with a formal statement of their claim, often within a very short period of time.[4] As this Court recognized in *Felder v. Casey*, "[s]uch statutes are enacted primarily for the benefit of governmental defendants," because "these requirements further the State's interest in minimizing liability and the expenses associated with it." 487 U.S. 131, 142–43 (1988). They do so in part by making it much more difficult for plaintiffs to bring

4. For examples of notice of claim provisions in state law, *see, e.g.*, ALA. CODE § 11-47-23 (6 months); ARIZ. REV. STAT. ANN. § 12-821.01(A) (180 days); CAL. GOV'T CODE § 911.2(a) (6 months); COLO. REV. STAT. ANN. § 24-10-109(1) (182 days); D.C. CODE § 12-309(a) (6 months); GA. CODE ANN. § 36-33-5(a) (6 months); IDAHO CODE ANN. §§ 6-905–906 (180 days); IND. CODE ANN. § 34-13-3-6(a) (270 days); ME. REV. STAT. ANN. tit. 14, § 8107(1) (180 days); MICH. COMP. LAWS ANN. § 600.6431(3) (6 months); MINN. STAT. ANN. § 466.05(1) (180 days); N.J. STAT. ANN. § 59:8-8 (90 days); N.M. STAT. ANN. § 41-4-16(A)–(B) (90 days); N.Y. GEN. MUN. LAW § 50-e(1)(a) (90 days); OR. REV. STAT. ANN. § 30.275(2) (180 days); 42 PA. CONST. STAT. ANN. § 5522(a) (6 months); TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (6 months); VA. CODE ANN. § 15.2-209(A) (6 months); WIS. STAT. ANN. § 893.80(1d)(a) (120 days).

claims against a government official: In Wisconsin, for example, whose laws were at issue in *Felder*, "[w]hile the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right." *Id.* at 141–42. In some states, this time period is even shorter. *See, e.g.*, N.J. STAT. ANN. 59:8-8 (90 days); N.M. STAT. ANN. §41-4-16 (90 days); N.Y. GEN. MUN. LAW § 50-e (90 days).

And civil rights victims, who are likely continuing to experience trauma and injury stemming from an officer's misconduct, must do more than appreciate that they may have a viable claim. They must then adequately fill out a notice of claim: they must comply with strict form and content requirements, identifying all potential defendants and describing the violation and injuries in sufficient detail; they must then identify the appropriate location or specific local official who needs to be served with the claim; and they must actually serve it. Failure to correctly follow any of those steps can be fatal. *See, e.g., Chidel v. Hubbard*, 840 A.2d 689, 695 (D.C. 2004) (explaining that "strict compliance with the terms of § 12-309 is 'mandatory as a prerequisite to filing suit against the District'" and that the "notice statute is construed narrowly against claimants") (quoting *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995)).

For most civil rights victims the assistance of a lawyer who is experienced in filing notice of claims and understands local requirements is crucial. But this means that the victim must find a lawyer, and actually retain a lawyer, and the lawyer must then sufficiently investigate the case to draft an adequate notice of claim—all before

the notice of claim deadline runs. Finally, a notice provision "operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant." *Felder*, 487 U.S. at 142.

This Court has made clear that, given the burdens state notice of claim requirements place on litigants, they cannot apply to claims brought under § 1983 whether in state or federal court: "however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation." *Felder*, 487 U.S. at 142–43. But nothing prevents states from strictly applying their own notice of claim provisions against a plaintiff's *state law* claim, thereby precluding many plaintiffs with valid claims from redress.

Andrew Celli, Jr., a founding partner of Emery Celli Brinkerhoff & Abady, LLP, who has practiced in the field of civil rights for 23 years and served as Chief of the Civil Rights Bureau at the Office of the New York Attorney General from 1999 to 2003, has seen firsthand over his career that

> "the notice-of-claim requirement is a trap for the unwary—or, in actuality, for the uneducated and the disconnected. Here in New York, the deadline for filing is 90 days after the 'favorable termination' of criminal charges. That concept is difficult enough for lawyers to sort out; for a lay person who has just been dragged through the criminal justice system, the last thing they are thinking of is filing a notice of claim. Clients regularly come to us with some or all of their

state law claims extinguished for lack of such a filing. Without the federal remedy, our clients would have no remedy at all."

C. Many states cap damages far below actual damages that may be caused by malicious prosecution.

State law restrictions on damages are another significant way that states prevent victims of malicious prosecution from fully vindicating their rights, even when a state-law malicious prosecution suit is not immunized.

As this Court has recognized, the availability of compensatory damages under § 1983 furthers the purposes of § 1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Compensating all of the injuries a victim actually suffers due to a violation both helps make a victim whole and, by putting potential wrongdoers on notice that they will pay for any damages they cause, "deter[s] the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 256–57 (1978); *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

State law, however, embodies different policy judgments. States often seek to shield officers from liability; they may prioritize state budgets over compensation of victims of civil rights violation by restricting the amount

of damages an individual can recover, even if the actual damages incurred exceed that amount. Nevada, for example, limits damages in cases brought "against a present or former officer or employee of the State or any political subdivision" to $100,000. NEV. REV. STAT. ANN. § 41.035. Wisconsin's limit is even lower: it caps damages in any claim against a "political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees" at $50,000. WIS. STAT. ANN. § 893.80(3). Many other states have similar limitations.[5]

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5. *See, e.g.*, ALA. CODE § 11-93-2 (Alabama limits damages on claims for bodily injury against a governmental entity to $100,000 per person, or $300,000 for two or more persons, arising out of a single occurrence); ALASKA STAT. ANN. § 09.17.010 (except in cases of "severe permanent physical impairment or severe disfigurement," limits noneconomic damages for personal injury or wrongful death to "$400,000, or the injured person's life expectancy in years multiplied by $8,000, whichever is greater"); IND. CODE ANN. § 34-13-3-4 (Indiana limits combined aggregate liability of all governmental entities and all public employees to $700,000 per person, per occurrence); KAN. STAT. ANN. § 75-6105 (Kansas limits damages in claims under Kansas Tort Claims Act to $500,000 for any claims arising out of a single occurrence); LA. REV. STAT. ANN. 13:5106 (Louisiana limits damages on claims against political subdivisions, which includes Sheriffs, to $500,000 per person, exclusive of property damages, medical care, and lost earnings); ME. REV. STAT. ANN. tit. 14 § 8105 (Maine limits damages, including costs, against "either a governmental entity or its employees, or both," to "$400,000 for any and all [tort] claims arising out of a single occurrence"); MD. CODE ANN. CTS. & JUD. PROC. § 5-303 (Maryland limits the liability of local governments to $400,000 per individual claim or $800,000 for total claims arising out of the same occurrence); MISS. CODE ANN. §11-46-15 (Mississippi limits damages in "any [tort] claim or suit for damages against a governmental entity or its employee" to $500,000 for "all claims arising out of a single occurrence"); N.D. CENT. CODE ANN.

These state law caps on damages not only prevent sufficient compensation in many cases, they perversely affect those who have suffered most—and who therefore have sustained the highest damages. Juries and judges across the country have recognized that the actual damages incurred when a person is unjustly imprisoned for weeks, months, or even years can easily reach 10 to 20 times these lowest state caps. *See, e.g.*, *Sykes v. Anderson*, 419 Fed. App'x 615, 616–17 (6th Cir. 2011) (recognizing evidence supported jury's substantial damages award where plaintiffs incarcerated for 56 and 77 days both suffered considerable lost wages and PTSD, and where one was separated from her infant son for over 2 months); *Manganiello v. City of New York*, 612 F.3d 149, 168–69 (2d Cir. 2010) (upholding substantial damages award where 4-year malicious prosecution caused plaintiff to permanently lose job in law enforcement and develop agoraphobia, PTSD and depression).

As NPAP member Chris Mills, who has been litigating civil rights cases in South Carolina for over 25 years, explains:

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§32-12.2-02 (North Dakota limits state liability and limits state indemnification of employees to $250,000 per person, or $1,000,000 for all claims arising from a single occurrence); R.I. GEN. LAWS ANN. § 9-31-3 (Rhode Island limits claims against cities and towns to $100,000, except where the municipality "was engaged in a proprietary function in the commission of the tort"); S.C. CODE ANN. § 15-78-120 (South Carolina limits the amount a person can recover to $300,000); *see also Noneconomic Damages Reform*, AMERICAN TORT REFORM ASSOCIATION (May 5, 2016 1:21 PM), http://www.atra.org/issues/noneconomic-damages-reform (collecting state law damages limitations and advocating that states impose a $250,000 limit on noneconomic damages in tort claims).

> "Given the overlapping immunities in South Carolina law, someone whose only claim is for malicious prosecution under state law is limited to $300,000 even if he proves liability. In cases with egregious facts—for example, I have a client who has been wrongfully incarcerated for 7 years—this is woefully inadequate."

D. State claims do not permit attorney fee awards.

Congress and this Court have recognized that attorney's fees are critical to enable a victim of official misconduct to vindicate her rights through § 1983. "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so." *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986). Victims of civil rights violations "ordinarily cannot afford to purchase legal services at the rates set by the private market," and even "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 576–77. "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court." *Hensley v. Eckerhart*, 461 U.S. 424, 445 (1983) (quoting S. Rep. No. 94-1011 at 2).

In enacting § 1988, Congress "authorized courts to deviate" from the standard rule, which "generally

requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.'" *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011). Section 1988 enables plaintiffs to remedy civil rights violations by acting "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam)).

States, however, do not necessarily share these same priorities. The myriad problems that prevent plaintiffs with successful civil rights claims from pursuing those claims, which led Congress to create the fee-shifting regime of § 1988, would still prevent plaintiffs from vindicating those injuries if plaintiffs were limited to pursuing state law actions alone.

Howard Friedman, an NPAP board member who has represented plaintiffs in civil rights litigation in Massachusetts for over 30 years, notes:

> "Most people we represent cannot afford to advance money to cover the costs of litigation, let alone any attorney's fee. For cases where the plaintiff's damages are not large—like malicious prosecution cases where the client was in custody for several days—we could not accept the case without the prospect of an attorney fee award under Section 1988 if we are successful. Without attorney's fees we would turn people away, even though they lost their liberty without legal justification."

E. State judgments may prove difficult to collect.

Even if a plaintiff successfully proves a violation of her rights and obtains an award of damages, government defendants, like the law enforcement officers in a malicious prosecution suit, may simply refuse to ever pay a judgment. For example, Louisiana's constitution prohibits enforcement of judgments against the state or a municipal subdivision, other than from funds appropriated by the legislature, or by the political subdivision against which a judgment was won. La. Const. art. XII, § 10(C). A state statute makes the same prohibition applicable to settlements. *See* La. Rev. Stat. § 13:5109(B)(2).

As the Supreme Court of Louisiana has noted, these provisions "create[] a frustrating dichotomy for the state's judgment creditors." *Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1266 (La. 2008). "[T]he judicial branch is empowered to render judgments against the state. However, the constitution does not provide the judiciary with the ability to execute those judgments." *Id.* at 1265; *see also id.* ("[T]he apparent liberality of abolishing most immunity from suit was offset by the continuation of a severe limitation on a private citizen's ability to enforce a judgment against the state, a state agency, or a local governmental entity.") (quoting Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 653 (1983)).

The same provision cannot prevent a federal court, however, from enforcing a judgment under federal law against a municipal officer. *See, e.g., Bowman v. City of New Orleans*, 914 F.2d 711, 712–13 (5th Cir. 1990)

(affirming district court order, under Fed. R. Civ. P. 69, to enforce civil rights judgment by seizing New Orleans bank account).

The inability of civil rights litigants to enforce judgments under state law has real consequences: It renders any successful suit illusory and effectively immunizes government actors for their misconduct. Mary Howell, a New Orleans civil rights attorney for nearly forty years and NPAP advisory board member, noted that the City of New Orleans currently has millions of dollars in unpaid state court judgments against it, which date back many years[6]:

> "Civil rights lawyers know that it's not a viable alternative to sue New Orleans law enforcement officers in state court for state torts. Even if you win, you won't be able to enforce a judgment."

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6. *See also* Robert McClendon, *Man Who Lost Leg After Being Struck by NOPD Cruiser Among Hundreds Awaiting Payment*, TIMES PICAYUNE, Dec. 3, 2014, *available at* http://www.nola.com/politics/index.ssf/2014/12/man_who_lost_his_leg_thanks_to.html (explaining that there are "more than 600 people waiting on a check from the city after winning a judgment or settling for damages," totaling nearly $35 million); Jeff Adelson, *Judge Hints at Possible Contempt Judgment if New Orleans Doesn't Make Overdue Payments to Firefighters Pension Fund*, NEW ORLEANS ADVOCATE, Oct. 6, 2015, *available at* http://www.theneworleansadvocate.com/news/13640241-171/judge-hints-at-possible-contempt (reporting arguments made by New Orleans at recent hearing that the city could not pay a judgment in that case in part due to "the roughly $35 million in other unpaid judgments the city faces that stretch back to the 1990s.").

F. State courts may be less hospitable to malicious prosecution plaintiffs.

Litigants with only state law claims cannot bring those claims in federal court; instead, they are limited to seeking redress in state court. *See Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003).[7] However, "[i]t is abundantly clear that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

Congress recognized that "state officers might, in fact, be antipathetic to the vindication of those rights, and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). Not only was this a possibility, it had occurred: state courts had been "used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* Thus, "[t]he very purpose of § 1983 was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive,

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7. There could of course be diversity jurisdiction allowing a state law malicious prosecution claim to be brought in federal court. That would be unusual, however, as victims of police misconduct are typically abused where they live.

legislative, or judicial.'" *Id.* at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

The same risks apply today, particularly in the context of suits against law enforcement officers such as local sheriffs or police. Without questioning the good faith of many state-court judges, there are unique pressures on local courts that may make it more difficult for judges to hold police officers accountable when they cross the line. For one, most local judges, unlike federal judges, are elected; as such, they face pressures to appear "tough on crime" and pro-law enforcement which often disfavors victims of police misconduct. *See, e.g.*, KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES (2015), *available at* http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf. And state and local judges are often closely connected with law enforcement themselves—many were law enforcement officers or prosecutors before taking the bench—and so may even personally know the officers being sued for malicious prosecution. *See, e.g.*, Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 566 (1994) (explaining that "[a]pproximately 85% of the gubernatorial appointments to the state bench in the last ten years have been former state court prosecutors," and noting the concern that "[i]ndividuals who earn appointment to the bench because of their dedication to law enforcement may feel uncomfortable criticizing police actions, especially in a close case").

Accordingly, state and local judges do not always function as the neutral and detached arbiters required

to effectively hold law enforcement officers accountable for misconduct. And in some places, local judges may themselves be part of the problem, operating with some of the same biases that underlie law enforcement abuses as well. *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3, 5 (Mar. 4, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (explaining that "[t]he municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct" and finding "substantial evidence of racial bias among police and court staff in Ferguson").

In other words, at least in some communities, the same concerns that, in Congress's judgment, necessitated the passage of § 1983 continue to exist today: State courts may and in some cases are "antipathetic to the vindication of [civil] rights." *Mitchum*, 407 U.S. at 240. This underscores why it remains critical for victims of police misconduct to continue to be able to seek redress for violations of their rights in federal court.

CONCLUSION

NPAP agrees with petitioner that the seizure and detention of a person without probable cause, whether accomplished with legal process or without, violates the Fourth Amendment. Section 1983 thus provides a remedy for that violation. And as the practical experiences of civil rights litigators demonstrates, a federal remedy under § 1983 is critical to ensure that victims of such serious official misconduct can be compensated and that officers will be deterred from committing such misconduct in the first place, to the benefit of us all.

Respectfully submitted,

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ELIJAH MANUEL, *Petitioner*,
v.
CITY OF JOLIET, ILLINOIS, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org and Gun Owners of America are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These legal and policy organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law They have filed many *amicus curiae* briefs in this and other Courts, including Fourth Amendment cases such as United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).[2]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Briefs *Amicus Curiae* of Gun Owners of America, *et al.* in Jones at the petition stage (http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf) and at the merits stage (http://www.lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf).

SUMMARY OF ARGUMENT

Petitioner Elijah Manuel has appropriately invoked the Fourth Amendment as a basis for his claim of malicious prosecution. Arrested without probable cause, Manuel was detained in actual custody for 48 days during which time the police falsified evidence before a grand jury leading to his arraignment on false charges which were dropped by the prosecutor only after discovery that the charges were baseless.

The Fourth Amendment guarantee against unreasonable searches and seizures is predicated on the right of the people to be secure in their "persons, houses, papers, and effects." Viewed against its common law backdrop, the Amendment's purpose and scope extend throughout any period of pretrial detention up to and including the day upon which all criminal charges are dropped. During that time interval, the Fourth Amendment governs the actions of the arresting authorities.

While the immediate effect of a violation of the Fourth Amendment is the deprivation of one's liberty, the interest protected by that Amendment is one's property rights. *See* Gradv v. North Carolina, citing United States v. Jones (effects) and Jardines v. Florida (houses). Foremost, the Amendment protects one's property rights in one's person. Indeed, by wrongfully holding Manuel in pretrial detention for 48 days, the City of Joliet and its police officers caused him not only emotional distress, but harmed his reputation,

inflicted out-of-pocket losses, and deprived him of employment opportunities.

Because all charges were dropped, this Court's exclusionary rule is of no value to Manuel to vindicate his Fourth Amendment interests. Indeed, this Court has severely cut back the availability of the exclusionary rule as a remedy for Fourth Amendment violations, indicating since the 1980's a strong preference for tortious actions as the primary means of enforcement.

The Seventh Circuit rule constricting the availability of a malicious prosecution action as a violation of the Fourth Amendment because it might cause "confusion" with a Fifth Amendment due process claim, in that both claims would be premised upon the same set of facts. Overlooked by this Seventh Circuit rule is the fact that the two constitutional guarantees address two distinctly different but overlapping legal interests. The Fifth Amendment due process claim would vindicate Manuel's liberty interest of freedom from restraint resulting from an unconstitutional misuse of legal process. The Fourth Amendment claim would compensate Manuel for the unreasonable seizure of his person resulting from an unconstitutional deprivation of his property interest in his person by an unconstitutional misuse of prosecutorial power. Manuel suffered violations of both of these interests.

ARGUMENT

I. THE FOURTH AMENDMENT GIVES RISE TO A CAUSE OF ACTION FOR MALICIOUS PROSECUTION UNDER 42 U.S.C. § 1983 TO RECOMPENSE PETITIONER'S PROTECTED PROPERTY INTEREST IN HIS PERSON.

This case comes to this Court from the United States Court of Appeals for the Seventh Circuit on a petition for a writ of certiorari to review that Court's affirmance of the district court's order dismissing a § 1983 civil rights claim.

Briefly, Petitioner Manuel alleges that he was arrested and taken into custody on the basis of falsified evidence, and subjected to physical violence at the scene of his arrest. Additionally, throughout a 48-day period in which he was held in physical custody, the police continually lied about the test results on pills seized from Manuel, including falsifying testimony before a Grand Jury and in an arraignment proceeding. On the fourteenth day of incarceration, a state lab report revealed that the seized pills were not illegal drugs. Finally, more than 30 days after that, the Assistant State's Attorney dismissed the charges on the basis of the state lab report, and Manuel was released from custody. A more complete statement of facts is set forth in the Brief for Petitioner and in the court of appeals opinion below. *See* Brief for Petitioner ("Pet. Br.") at 2-6; Manuel v. City of Joliet, 590 Fed. Appx. 641, 642 (7th Cir. Dec. 28, 2015).

The court of appeals affirmed the district court's order dismissing all charges as time-barred, except for Manuel's charge of malicious prosecution based upon the Fourth Amendment. As to that claim, the court of appeals upheld its dismissal on the sole ground of the Circuit's reigning precedent that "'[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.'" Manuel at 643.

As the Petitioner's Brief demonstrates, the Seventh Circuit rule blocking a malicious prosecution charge resting upon the Fourth Amendment not only conflicts with the law in 10 federal circuits, but also with the explanations and reasonings that a majority of Justices expressed in Albright v. Oliver, 510 U.S. 266 (1994). *See* Pet. Br. at 8, n.4. Petitioner's brief cites the opinions of the several justices in Albright in support of a number of points.[3] This *amicus* brief singles out Justice Ginsburg's concurring opinion, demonstrating how and why the Fourth Amendment applies to a malicious prosecution claim after an unconstitutional arrest, such as the claim made by Manuel in this case.

A. The Fourth Amendment Provides a Proper Basis for Petitioner's Claim.

In Albright, Justice Ginsburg offered reasons why the Fourth Amendment's "probable cause"

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[3] *See* Pet. Br. at 8, 12, 14-16, 23-24, 26-28, 30, 34.

requirement does not end prior to a person's release from custody — such as at the time of a preliminary hearing. *Id.* at 277-80. That is the very point of contention in this case: the court of appeals below ruled that "if Manuel has a Fourth Amendment claim ... it would have stemmed from his arrest on March 18, 2011" and ceased at the point of arraignment. Manuel at 643.[1]

To the contrary, Justice Ginsburg wrote: "The Fourth Amendment's instruction to police officers seems to me more purposive and embracing." *Id.* Albright at 277. Noting that the Supreme Court had already drawn on the common law to "aid contemporary inquiry into the meaning of the Amendment's term 'seizure,'" Justice Ginsburg conducted her own review of the common law of arrest and custody, concluding that once a person has been arrested and charged with an offense, a "defendant is scarcely at liberty: he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Id.* at 279. Thus, Justice Ginsburg maintained that a defendant, even if released pretrial, is "still 'seized' in the constitutionally relevant sense." *Id.*

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[1] Although the date the Fourth Amendment claim ends relates in this case to a statute of limitations defense, the state's position would also have the effect of limiting the state's financial exposure for such actions to the typically brief period between arrest and arraignment, even if incarceration continues for many weeks, as here.

Thus, Justice Ginsburg asserted:

> This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers[,] govern[ing] both the manner of, and the cause for, [an] arrest.... [*Id.*]

Applying the Fourth Amendment's text, Justice Ginsburg stated: "Albright remained effectively 'seized' for trial so long as the prosecution against him remained pending, and that [police officer] Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure...." *Id.* at 280.

It is, then, the Fourth Amendment's standard of "probable cause" that governs the constitutionality of the initial arrest, and the Amendment's "reasonableness" standard that governs whether the "manner" of effecting that arrest "perpetuated the Fourth Amendment violation." *See id.* at 279. *See also* 100.

Manuel, who was held in physical custody for 48 days, remained "seized" in the constitutional sense throughout the period of incarceration. *See id.* at 279. *See also* Hernandez-Cuevas v. Taylor, 723 F.3d 91, 100-101 (1st Cir. 2013) and cases cited therein. Manuel's unconstitutionally effected arrest perpetuated the initial seizure by the Joliet police officers who falsified the evidence and misled both a

Grand Jury and the prosecutor by their duplicity in violation of the Fourth Amendment.[5]

In sum, as Justice Ginsburg reasons, whether or not an arrested and charged person is kept in custody or even if released from physical custody, the Fourth Amendment sets the standard for alleging and proving a violation of 42 U.S.C. § 1983, the breach of which gives rise to a cause of action for malicious prosecution according to the common law principles underlying that Amendment.

B. The Fourth Amendment Protects Manuel's Property Rights in His Person.

The correctness of Justice Ginsburg's common law approach to the people's liberty interests secured by the Fourth Amendment is supported by this Court's unanimous *per curiam* opinion in Grady v North Carolina, 575 U.S. __, 135 S.Ct. 1368 (2015). In Grady, this Court affirmed the holdings in United States v. Jones[6] and Florida v. Jardines,[7] that a search within the meaning of the Fourth Amendment occurred when "the Government had physically

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[5] As Justice Scalia has observed, at common law the tort of malicious prosecution could be sustained upon proof of a malicious act coupled with the absence of probable cause and the ultimate termination of criminal charges, and this is precisely the situation in Manuel's case. *See* Kalina v. Fletcher, 522 U.S. 118, 133 (1997). *See also* Pet. Br at 7.

[6] 565 U.S. __, 132 S.Ct. 945 (2012).

[7] 569 U.S. 1, 133 S.Ct. 1409 (2013).

occupied private property for the purpose of obtaining information,'" regardless of whether the intrusion invaded the occupier's personal privacy. Grady at 1370.

As elaborated in Jones, this Court's "Fourth Amendment jurisprudence was [originally] tied to common-law trespass," consistent with the Amendment's text which secured the people's "persons, houses, papers, and effects." Jones, 132 S.Ct. at 949. And, as explained in Jardines, Jones restored this original understanding, affirming the "Amendment's property-rights baseline." Jardines, 133 S.Ct. at 1417 Thus, the first step in any Fourth Amendment analysis is to identify what, if any, property interest is at stake.

In Jones and Jardines, the property interests were a person's exclusive possession in "effects" and "houses," respectively. In Jones, the Court found that, by placing a GPS tracking device on a motor vehicle, "[t]he Government physically occupied private property," leading it to find that "no doubt ... such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.*, 132 S.Ct. at 949. In Jardines, the Court found the use of a drug-sniffing dog "in an area belonging to Jardines and immediately surrounding his house — in the curtilage of the house" — to be a search. *Id.*, 133 S.Ct. at 1414. In both cases, the Government committed a common law trespass, as had been recognized during the nation's founding era. *See* Jones, 132 S.Ct. at 949; Jardines 133 S.Ct. at 1415.

In Manuel's case, the property interest at stake is in his "person." As Jones, itself, acknowledges:

> The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their **persons**, houses, papers, and effects" would have been superfluous. [Jones, 132 S.Ct. at 949 (emphasis added).]

Far from being superfluous, the idea of having a property interest in one's person was central to the founding of the American Republic.

It is no accident that the list of protected interests under the Fourth Amendment begins with "person," as one's person is foremost among his property interests. Today, most would associate "person" with a so-called "right of privacy." But at the time the Fourth Amendment was ratified, the word "person" had a very different meaning and connotation, paralleling the 17th-century property theories of John Locke:[8]

> every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body and the Work of his Hands ... are properly his. [J. Locke, Second Treatise of Government, para. 27 (facsimile ed.), reprinted in J. Locke, Two Treatises of

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[8] *See, e.g.*, B. Bailyn, The Ideological Origins of the American Revolution at 26-31 (Harvard University Press, 1967).

> Government, pp. 287-88 (P Laslett, ed., Cambridge Univ. Press: 2002).]

Locke reasoned that "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." *Id.* at para. 44. Stanford University historian and Pulitzer Prize winner Jack Rakove explains that:

> For Locke ... the concept of property encompassed not only the objects a person owned but also the ability, indeed the right to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely claim their rights, but also owned them, and their title to their liberty was as sound as their title to the land or to the tools with which they earned their livelihood. [J. Rakove, Revolutionaries. A New History of the Invention of America at 78 (Houghton Mifflin Harcourt, 2010).]

Applying these principles here, both Manuel's arrest and his continuing detention for 48 days without probable cause constituted a Fourth Amendment seizure because it deprived Manuel of his freedom of movement, as well as denying him work and educational opportunities to his financial detriment. Pet. Br. at 6. As Locke would have put it, the incarceration of Manuel denied him the "labor of his body and the work of his hands." *See* Locke, *supra*.

C. Petitioner Has Suffered Economic Harm on Account of the Violation of His Fourth Amendment Rights.

In her Albright concurrence, Justice Ginsburg identified with some particularity the property rights at stake when the Fourth Amendment is violated. Depriving a person of his liberty of movement may result in severely diminished "employment prospects," "reputational harm,"[9] and the "financial ... strain of preparing a defense." *Id.* at 278. In his Albright concurrence, Justice Souter affirmed Justice Ginsburg's list, repeating "reputational harm," and adding to it "inability to transact business or obtain employment in his local area; necessitating relocation ... inability to secure credit." *Id.* at 289 (Souter, J., concurring).

Unlike Albright, however, Manuel has alleged in his complaint that his arrest and pretrial detention violated his Fourth Amendment rights vested in his person. *See* Pet. Br. at 9. As Manuel points out in the concluding section of his brief, he is entitled under § 1983, not only to damages for his economic losses, but also for his emotional suffering resulting from his loss of personal liberty, caused by the malicious and

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[9] The common law tort of malicious prosecution was linked to the common law torts of slander and libel, each of which was designed to protect a person's reputation, and to provide recompense for loss to one's trade or livelihood. *See* 3 W Blackstone, Commentaries on the Laws of England 123-26 (Univ. Chi. Facsimile ed., 1768).

indefensible actions of arresting and holding him without probable cause. *See* Pet. Br. at 33-36.

II. This Court Has Long Expressed Dissatisfaction with the Exclusionary Rule, Preferring Instead Other Remedies for Fourth Amendment Violations.

This case, of course, is not an exclusionary rule case. Because the police never found any evidence of any crime, Manuel was never brought to trial, and there was no "evidence" to suppress. However, this case is appropriately viewed in the shadow of this Court's prior rulings on the exclusionary rule. In recent years, this Court has narrowed the scope of the exclusionary rule, pointing towards other remedies as better alternatives to deter government agents from violating the constitutional rights of Americans. In this case, Manuel seeks to avail himself of one of those alternate remedies — a malicious prosecution claim based on deprivation of Fourth Amendment rights, brought under 42 U.S.C. § 1983.

Having limited the protections provided by the exclusionary rule, this Court now has a special responsibility to protect access to a civil remedy to protect Fourth Amendment rights. To do otherwise risks leaving the Fourth Amendment toothless and ineffective on all fronts. Dissenting in Hudson v. Michigan, 547 U.S. 586 (2006), Justices Breyer, Stevens, Souter, and Ginsburg echoed similar concerns, noting that "our Fourth Amendment traditions ... emphasize the need to assure that its constitutional protections are effective, lest the

Amendment 'sound the word of promise to the ear but break it to the hope.'" *Id.* at 630.

A. Once a Powerful Tool Protecting Fourth Amendment Rights, this Court Has Significantly Narrowed Application of the Exclusionary Rule Over Time.

The exclusionary rule has its modern roots as far back as Boyd v. United States, 116 U.S. 616 (1886), involving compulsory production of a person's papers. A century ago, in Weeks v. United States, 232 U.S. 383 (1914), Justice Day wrote for the Court that, if evidence could be obtained in violation of the Fourth Amendment, and then used at trial, the Fourth Amendment "is of no value, and ... might as well be stricken from the Constitution." *Id.* at 393. Olmstead v. United States, 277 U.S. 438 (1928), summarized the Weeks exclusionary rule as a "sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." *Id.* at 462. A half century after Weeks, in Mapp v Ohio, 367 U.S. 643 (1961), this Court applied the exclusionary rule to the states through the Fourteenth Amendment, and stated broadly that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.[10] As late as 1968, this Court described the

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[10] Critics of the exclusionary rule argue that the rule protects only criminals, and often point to Justice Cardozo's famous statement that "the criminal is to go free because the constable has

exclusionary rule as "the only effective deterrent to police misconduct in the criminal context." Terry v. Ohio, 392 U.S. 1, 12 (1968).

Over time, however, support for this expansive remedy began to wane, as the Court in the 1980's severely scaled back its application in a series of cases. In United States v. Leon, 468 U.S. 897 (1984), the Court permitted the introduction of evidence discovered with a warrant that was not based upon probable cause, finding the police had acted in "good faith" while executing the warrant. There, the Court asserted that "[w]hether the exclusionary sanction is appropriately imposed in a particular case is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Id.* at 906. Both before and since Leon, various decisions of this Court have continued to limit application of the exclusionary rule in other contexts.[11]

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blundered." People v. Defore, 150 N.E. 585, 587 (N.Y 1926). Mapp addressed such claims, noting that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659.

[11] *See also* United States v. Calandra, 414 U.S. 338 (1974) (no exclusionary rule for Grand Jury proceedings); Segura v. United States, 468 U.S. 796 (1984) (no exclusion of evidence where police unlawfully detained a man, illegally entered his home, and illegally stayed for 19 hours awaiting a search warrant, because the evidence eventually was found pursuant to a lawful warrant); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (no exclusionary rule where police rely in good faith on defective warrant); Illinois

The Court in Leon ignored Justice Brennan's early warning that, "in case after case, I have witnessed the Court's gradual but determined strangulation of the [exclusionary] rule." Leon at 928-29 (Brennan, J., dissenting). Indeed, the modern Court's understanding of the exclusionary rule now presumes that the Constitutional text does not explicitly require exclusion of evidence,[12] and the exclusionary rule being

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v. Krull, 480 U.S. 340 (1987) (good faith exception to exclusionary rule where statute permitting warrantless search was later found unconstitutional); Murray v. United States, 487 U.S. 533, 542 (1988) (independent source doctrine applies to avoid the exclusionary rule "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one...."); New York v. Harris, 495 U.S. 14 (1990) (no exclusion where police unlawfully arrested someone at home without a warrant, who then obtained incriminating statements from him at the police station, because the statement was not the fruit of an arrest at home); Arizona v. Evans, 514 U.S.1 (1995) (no exclusionary rule where police operated under mistake of fact based on erroneous court records); Hudson v. Michigan, 547 U.S. 586 (2006) (violation of knock-and-announce rule when serving a warrant did not require exclusion of evidence because the Fourth Amendment violation involved only how the warrant was served, and not how the evidence was obtained); Herring v. United States, 555 U.S. 135 (2009) (no exclusionary rule where police operated under mistake of fact based on erroneous police records); and Heien v. North Carolina, 574 U.S. ___ (2014) (no exclusion based on mistake of law). *See also* New York v. Quarles, 467 U.S. 649 (1984) (no exclusion of a statement obtained from a suspect, based on a "public safety' exception to *Miranda* warning).

[12] Justice Brennan believed that evidence obtained in an unconstitutional fashion could never be admitted into evidence, and that obtainment and introduction of evidence are but a single, unconstitutional government action. Leon at 933. Justice Ginsburg echoed those concerns, stating that "the Amendment 'is

only a judicially created remedy designed to deter the government from violating people's rights. Ignoring Mapp's expansive statement of the exclusionary rule's purpose, the modern Court has applied the rule based on subjective cost-benefit analyses,[13] whereby if no sufficient deterrent purpose is fulfilled by the allegedly "costly" exclusion of evidence, then the rule does not

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a constraint on the power of the sovereign, not merely on some of its agents.'" Herring at 151-52. This had been the Court's original understanding of the exclusionary rule. The Court in Weeks v. United States, 232 U.S. 383, 392 (1914), stated that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution...." Indeed, Weeks continued, it is "the duty of giving [the Fourth Amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 392.

[13] Justice Breyer saw things differently, claiming that the exclusionary rule actually imposes no "cost," since if the Constitution had been followed, there would have been no evidence to begin with. Therefore, the only "cost" of the exclusionary rule was that "official compliance with Fourth Amendment requirements makes it more difficult to catch criminals." Leon at 941. Indeed, the dissenters in Hudson noted that "[t]he majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself." Hudson at 614. So too did the Court in Weeks, noting that "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Id.* at 393.

apply.[14] Frequently. this Court has noted the "substantial societal cost" imposed by excluding evidence, calling it a "jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." Hudson at 595.[15]

In 1977, Justice Brennan made the suggestion that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by Supreme Court's interpretation of federal law." W J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," 90 HARV. L. REV 489, 491 (1977). Indeed, many state courts have essentially overridden this Court's narrowing of the exclusionary rule. *See* R. M. Bloom and H. J. Massey, "Accounting for Federalism in State Courts — Exclusion of Evidence Obtained Lawfully By Federal Agents," 79 UNIV. COLO. L. REV. 381, 389 (2007) (noting the interesting juxtaposition whereby "[p]rior to the Mapp decision, the federal Constitution provided greater rights to individual defendants. Immediately after Mapp, rights of federal or state criminal defendants

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[14] Dissenting in Leon, Justice Stevens noted that "[t]oday, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding." *Id.* at 977

[15] Some fear the Court's 2009 decision in Herring "jumped the firewall" and is the precursor to complete elimination of the exclusionary rule. *See* A. Liptak. "Supreme Court Steps Closer to Repeal of Evidence Ruling." NEW YORK TIMES (Jan. 31. 2009) at A1.

vis-a-vis the police were the same. Now defendants in some states are enjoying greater protections under state law than federal law ").

B. The Exclusionary Rule Has Been Limited, in Part, Because Other Remedies Would Address Fourth Amendment Violations.

The Hudson Court described the exclusionary rule as the product of a bygone age, and that "[w]e cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago." *Id.* at 597 In rejecting application of the exclusionary rule in Hudson, the Court pointed to alternative remedies which it believed would fully address constitutional violations.

In particular, the Court pointed towards 42 U.S.C. § 1983 as the best way to rectify constitutional violations,[16] noting that, during the height of the

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[16] In truth, the Court's reliance on Section 1983 actions ignored the real world problems of such litigation. Section 1983 actions are difficult to win for numerous reasons, not the least of which is the qualified (or even absolute) immunity typically enjoyed by police and prosecutors acting within the scope of their employment. Additionally, accused criminals bringing civil suits do not typically make sympathetic plaintiffs, whereas police are specially trained to testify and to appear likeable to juries. Often, if there was no monetary harm, nominal damages are of little benefit to a victim. Lastly, even if a judgment is successfully

exclusionary rule in the 1960's, "[i]t would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities," and "[c]itizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after Mapp, with this Court's decision in Bivens...." *Id.* The Court continues its support of Section 1983 actions in lieu of the exclusionary rule, noting that "Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence...." *Id.*[17]

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obtained, many victims find out that the police officers who violated their rights are essentially judgment-proof, and there is little or nothing to collect.

[17] The Court also pointed to "[a]nother development over the past half-century that deters civil-rights violations ... the increasing professionalism of police forces, including a new emphasis on internal police discipline." *Id.* at 598. The Court claimed that "modern police forces are staffed with professionals ... **internal discipline** ... can limit successful careers...." *Id.* at 599 (emphasis added). Of course, if these statements were true, there would be little to no "societal cost" to maintaining a robust exclusionary rule.

Unfortunately, judges who work "in the trenches" have had different experiences. In one major American city, an "investigation documented [a] troubling phenomenon, with more than a dozen examples over the past few years in which police officers, according to judges, gave false or questionable testimony -- but experienced few, if any, repercussions. ... The Chicago Police Department and the Cook County state's attorney's office **almost never hold officers accountable** in spite of claims they have a zero-tolerance policy for officers who do not tell the truth. The issue so erodes trust in the criminal justice system that the U.S. Department of Justice, as part of its civil rights investigation

Because the Court has, in part, justified its move away from the exclusionary rule because of the availability of alternative remedies for Fourth Amendment violations, it must protect those alternative remedies. In fact, in many instances, these alternative remedies can accomplish what the exclusionary rule cannot, such as the present case:

> Tort liability is especially appropriate [where no prosecution is brought] because "the exclusionary rule offers absolutely no compensation or deterrence whatsoever" when "the cops know you are innocent and just want to harass you." [J. P Goldstein, "From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions," 106 COLUM. L. REV. 643, 662-663 (2006).]

C. The Court Should Adopt an Expansive View of Malicious Prosecution Claims in Recognition of the Important Fourth Amendment Rights at Stake.

The court of appeals below justified that circuit's restricted view that "Fourth Amendment claims are typically 'limited up to the point of arraignment,' after

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into the Police Department, has asked the Cook County public defender's office to refer cases with evidence that officers testified falsely...." S. Mills and T Lighty, "Cops rarely punished when judges find testimony false, questionable," Chicago Tribune (May 6, 2016) (emphasis added), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-testimony-met-20160506-story.html.

which it becomes a malicious prosecution claim." Manuel at 643. Apparently, this view has prevailed in the Seventh Circuit to avoid the "confusion" that might result from allowing a Fourth Amendment claim to spill over on a Fifth Amendment claim. *Id.* To avoid this confusion, the Seventh Circuit has ruled that "'[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.'" *Id.*

As Manuel points out in his brief, there is no good reason why the due process claim should preempt a Fourth Amendment claim arising out of the same unlawful detention. *See* Pet. Br. at 26. Although the facts may be the same, there are two distinct wrongs committed. Overlooked by this Seventh Circuit rule is the fact that the two constitutional guarantees address two distinctly different legal interests. The Fifth Amendment due process claim would vindicate Manuel's liberty interest of freedom from restraint resulting from an unconstitutional misuse of legal process. The Fourth Amendment claim would compensate Manuel for the unreasonable seizure of his person resulting from an unconstitutional deprivation of one's property interest in his person by an unconstitutional misuse of prosecutorial power.

Instead of recognizing the different interests addressed by the two Amendment guarantees, the Seventh Circuit's decision appears to rest on the overriding unconstitutional proposition that "Manuel has no Fourth Amendment right to be free from groundless prosecution." Manuel at 643. The

unstated corollary of this statement is that Manuel loses his Fourth Amendment property right to be free from unlawful seizure by the state at some arbitrary moment in time when a state prosecutor joins with the state police in perpetuating Manuel's seizure and incarceration. Such a statement views Manuel's incarceration only from the perspective of the government. It focuses narrowly on which component of law enforcement is participating in the deprivation of Manuel's right to bodily freedom. However, when these same facts are viewed from the perspective of Manuel, it becomes clear that the unlawful seizure of his body continued uninterrupted throughout his incarceration, irrespective of whether the wrongful acts were committed by the state's police alone, or with the assistance of the state's prosecutors.

CONCLUSION

The decision of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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